Supreme Court, U.S.
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In The

Supreme Court of the United States

TODD STEPHEN CACCAMO,

Petitioner,

v.

THE PEOPLE OF THE CITY OF WESTLAND,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

PETITION FOR A WRIT OF CERTIORARI

DEMOSTHENES LORANDOS, PH.D., J.D.
Counsel of Record for Petitioner

ASHISH S. JOSHI, *Associate Attorney*
D. LORANDOS, PH.D., J.D., P.C.
214 N. Fourth Avenue
Ann Arbor, Michigan 48104
(734) 327-5030

STUART G. FRIEDMAN, *Co-Counsel*
843 Penniman Avenue
Plymouth, Michigan 48170
(734) 662-4070

Attorneys for Petitioner
Todd Stephen Caccamo

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the Constitutional guarantee to Due Process allow a criminal defendant to withdraw his plea where the trial judge misleads or confuses the defendant during the plea-taking procedure?

2. Whether trial counsel's lies, affirmative misrepresentations and coercive techniques violated a criminal defendant's right to effective counsel pursuant to the Sixth Amendment to the United States Constitution?

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OPINIONS BELOW

The orders of the Supreme Court of Michigan dated October 31st, 2005, Michigan Court of Appeals dated February 15th, 2005, the Third Circuit Court for the Wayne County, Michigan (undated) are unreported, but copies of these orders are included in the Appendix.

JURISDICTION

On February 15th, 2005, the Michigan Court of Appeals reversed the Circuit Court's decision allowing the petitioner to withdraw his plea. Petitioner's motion for rehearing challenging the Michigan Court of Appeals' judgment was denied on April 11th, 2005. Thereafter, Petitioner filed an Application for Leave to Appeal in the Michigan Supreme Court challenging the judgment of the Michigan Court of Appeals. On October 31st, 2005, the Michigan Supreme Court denied leave to appeal. Petitioner's timely motion for reconsideration was further denied by the Michigan Supreme Court on January 30th, 2006.

The present petition is timely filed under 28 U.S.C. §1257(a) and under Rule 13.3 of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein

> the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Fourteenth Amendment to the United States Constitution, inter alia, provides:

> Section 1. . . . Nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF FACTS

This petition for writ of certiorari seeks review of the Michigan Court of Appeals'[1] judgment concerning federal questions of paramount importance wherein the court's decision conflicts with the decisions of this Court and numerous other state courts of last resort. This petition involves the Michigan Court of Appeals' refusal to permit the Petitioner TODD STEPHEN CACCAMO ("Caccamo") to withdraw his plea of *nolo contendere* (under advisement) to a charge of domestic violence and proceed to trial.

Caccamo, a former United States Marine, owned a karate studio in Westland, Michigan. Colleen Kurth was a

[1] The Michigan Supreme Court denied petitioner's application for leave to appeal. Therefore, for all practical purposes, Michigan Court of Appeals' judgment is the "judgment rendered by the highest court of a State in which a decision could be had [that] may be reviewed by the Supreme Court by writ of certiorari. . . ." 28 U.S.C. §1257(a).

Garden City police officer, a black belt karate instructor at Caccamo's studio and a former friend of the Petitioner (App – 34). The two individuals had an alleged casual sexual relationship prior to the instant charges, *Id.* Caccamo was accused of using excessive force in ordering Ms. Kurth from the premises.

From the very outset of legal proceedings, Caccamo made a protestation of innocence and contested all charges. Caccamo had recorded the entire incident on an audio tape and was confident of winning at trial (App – 41). However, after being threatened and continually harassed by the Ms. Kurth (an armed police officer with a documented history of mental health issues) Caccamo's biggest concern was about "this woman shooting [him] and [his] wife" (App – 29). Accordingly, despite having an excellent defense on the substantive issues, on advice of his attorney, Caccamo agreed to "bit[e] the bullet" and consider a plea bargain (App – 41).

Prior to agreeing to the plea bargain, Caccamo's trial attorney, Marc Lakin, made several affirmative misrepresentations to petitioner:

- Lakin lied to Caccamo that Caccamo would not plead under the domestic violence statute, MCL 769;
- Lakin incorrectly informed Caccamo that Caccamo's plea could be withdrawn "at anytime," even after sentencing, even up to the last day of the probation, if Caccamo so desired;
- Lakin incorrectly informed Caccamo that "no contest" is not at all considered a guilty plea

(App – 88).

However, the ultimate plea turned out to be a radically different creature and Caccamo discovered that due to affirmative misrepresentations and lies of his attorney, he had "agreed" to a plea that in no way resembled the one that he understood.

On May 9th, 2003, during the plea-taking procedure, the trial judge used contradictory phrasings as to whether the plea was "under advisement" or "accepted." The court specifically informed Caccamo that his plea remained under advisement (App – 47). A similar statement appeared on the record from Caccamo's counsel (App – 50). Curiously, after stating that the plea remained under advisement, the court stated that it would "accept the no contest plea" (App – 51).

Being thoroughly confused with the plea that he was "agreeing" to and whether the plea was being taken "under advisement" or was "accepted," Caccamo instructed his attorney to withdraw the plea. Lakin refused to withdraw the plea and coerced Caccamo into playing along with his "deal." (App – 88).[2]

Caccamo was sentenced on June 25th, 2004. After, the complainant allocuted by telling the court her version of events and while the District Court was passing down the sentence, Caccamo again asked his attorney to withdraw the plea. Again, Lakin refused. (App – 88).

Caccamo was sentenced under the Michigan's domestic violence statute – the very statute that his attorney

[2] This affidavit was the part of Petitioner's *Motion for Ginther Hearing and Expansion of Record* filed in the District Court on November 17th, 2003.

had told him he would *not* plead under. Caccamo was sentenced to one year of non-reporting probation with a condition requiring him to attend a domestic violence weekend program and follow any recommendations regarding the complainant. He was also subject to a no contact provision with the complainant and ordered to pay a fine. The record contains no history of probation violation and Caccamo's compliance with the conditions of the sentence is not challenged by the City of Westland.

Finally, Caccamo fired Lakin, hired another attorney and filed a motion to withdraw the plea on August 19th, 2003. The motion was orally denied by the District Court. On September 3rd, 2003, Caccamo filed a motion for reconsideration in the District Court. This motion too was denied by the District Court on September 22nd, 2003. (App – 8).

On October 10th, 2003, Caccamo appealed to the Wayne County Circuit Court challenging the District Court's ruling. After full briefing and oral arguments, on or around January 30th, 2004, the Wayne County Circuit Court vacated the plea and remanded the matter for further proceedings (App – 6). The City then filed a motion for reconsideration which was subsequently denied by the Circuit Court on April 8th, 2004 (App – 55).

The City appealed to the Court of Appeals. On February 15, 2005, the Court of Appeals vacated the Circuit Court's order and reinstated the District Court's ruling (App – 2). Caccamo filed a motion for rehearing challenged this decision of the Michigan Court of Appeals. On April 11th, 2005, the Michigan Court of Appeals denied the request in a form order (App – 54).

Thereafter, Caccamo filed an Application for Leave to Appeal in the Michigan Supreme Court challenging the judgment of the Michigan Court of Appeals. On October 31st, 2005, the Michigan Supreme Court denied his leave to appeal (App – 1). Caccamo's timely motion for reconsideration was further denied by the Michigan Supreme Court on January 30th, 2006 (App – 53).

This petition for certiorari follows.

ARGUMENT

I. THIS COURT SHOULD SETTLE AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHETHER THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS ALLOWS A CRIMINAL DEFENDANT TO WITHDRAW HIS PLEA WHERE THE TRIAL JUDGE MISLEADS OR CONFUSES THE DEFENDANT DURING THE PLEA-TAKING PROCEDURE.

In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, L.Ed.2d 274 (1969), this Court recognized that the question of whether a guilty plea, entered in a state court, is voluntary, knowing and intelligent, involves ***federal constitutional rights*** and is governed by ***federal standards***.

Several other state courts of last resort have held that where a defendant labors under a mistake or misrepresentations or *confusing statements made by the judge*, it is sufficient grounds for withdrawal of his plea. *See State v. DeZeler*, 427 N.W.2d 231, 234 (Minn. 1988); *State v. Loyd*, 291 Minn. 528, 530, 190 N.W.2d 123, 124 (1971); *State v. Galliano*, 396 So.2d 1288, 1290 (La. 1981); *Banks v. State*,

887 So.2d 1191, 1196 (Fla. 2004); *also see People v. Cohn*, 91 Ill.App.3d 209, 214 (1980); *People v. Ryan*, 74 Ill.App.3d 886, 890, 392 N.E.2d 1380, 1383 (1979); *People v. Marshall*, 30 Ill.App.3d 17, 331 N.E.2d 566 (1975).

To the best of counsel's knowledge, Michigan courts have not ruled on this issue. However, if the decision of the Michigan Court of Appeals in this case is allowed to stand, an important federal question will be decided in a way that conflicts with the decision of several other state courts of last resort. Also, to the best of counsel's knowledge, this Court too has not ruled on whether the Due Process clause requires allowing a criminal defendant to withdraw his plea when it is induced by misrepresentations or confusing statements made by a trial judge. This Court should take this opportunity to settle this important question of federal law.

In this case, Judge Vera Massey-Jones of the Third Circuit Court for the Wayne County, Michigan, correctly stated that the Michigan Court Rules require the District Court to determine that the plea is "understandingly, voluntary and accurate" (App – 16). Reviewing the record of the plea-taking procedure and taking note of the confusing and contradictory lexicon used by the trial judge, Judge Massey-Jones ruled that the District Court did not carry out its burden in ensuring that the plea was voluntarily and understandingly tendered (App – 16-23).

Michigan and federal cases have long required that a court taking a plea engage in questioning of the defendant to ensure that a plea was in fact voluntarily and understandingly tendered. *People v. Cox*, 268 Mich. App. 440, 458, 709 N.W.2d 152 (2005). The purpose of questioning a defendant about his plea requires the court to refrain from

engaging in a rote litany. The constitutionally mandated purpose is to ensure that the plea is tendered understandingly, voluntarily and accurately. A guilty plea is "a grave and solemn act to be accepted only with care and discernment" because "the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial." *Brandy v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 23 L.Ed.2d 747 (1979).

Since *Kercheval v. United States*, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927), this Court has recognized that "unfairly obtained" guilty pleas in the federal courts ought to be vacated. In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, L.Ed.2d 274 (1969), this Court recognized that the question of whether a guilty plea, entered in a state court, is voluntary, knowing and intelligent, involves federal constitutional rights and is governed by *federal standards*. For the waiver which a guilty plea represents to be valid under the Due Process Clause, it must be "an intentional relinquishment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

The test for determining the validity of a guilty plea was summarized in *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970):

> The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.

In *Brandy, supra*, 387 U.S. at 748, this Court said:

> But the plea is.... Defendant's consent that judgment of conviction may be entered without a

> trial – a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. [Footnote omitted]

A guilty plea may not stand if, as in the instant case, it is not made understandingly, or if it is induced by misrepresentations or unfulfilled promises. *See Brandy v. United States, supra,* 397 U.S. at 755, citing with approval Judge Tuttle's decision in *Shelton v. United States*, 246 F.2d 571, 572 fn. 2 (5th Cir. 1957), rev'd, 356 U.S. 26, 78 S.Ct. 563, 2 L.Ed.2d 579 (1958). The plea must be entered by a defendant who understands the situation and who has been neither deceived nor coerced. For e.g., *see Schnautz v. Beto*, 416 F.2d 214, 216 (5th Cir. 1969) ("the plea must be a genuine one by a defendant who understands the situation, his rights, and the consequences of his plea and is neither deceived nor coerced").

A guilty plea may not be the product of incomprehension on the part of the defendant, *Boykin v. Alabama, supra*, 395 U.S. at 243. A guilty plea which is "the tainted product of ignorance" is also void. *United States v. Malcolm*, 432 F.2d 809, 811 (2d Cir. 1970).

For more than 100 years, Michigan law has recognized that guilty pleas must be freely and understandingly made. *Edwards v. People*, 39 Mich. 760 (1878). The rule in Michigan for at least the last 84 years has been:

> The plea should be entirely voluntary by one competent to know the consequences, and should not be induced by fear, misapprehension, persuasion, promises, inadvertence or ignorance. *People v. Merhige*, 212 Mich. 601, 612 (1920).

This rule was affirmed in *People v. Barrows*, 358 Mich. 267 (1959) and reaffirmed in *People v. Johnson*, 386 Mich. 305 (1971). *See also People v. Jaworski*, 387 Mich. 21 (1972); *Guilty Plea Cases*, 395 Mich. 96, 125-128 (1975); *People v. Sundling*, 153 Mich. App. 277, 282 (1986). Yet, in this case, the Michigan Court of Appeals has inexplicably ruled that despite the confusing and misleading statements made by the trial judge and despite the lies and affirmative misrepresentations made by trial counsel, Caccamo's plea was "understanding, voluntary, and accurate" (App – 3). The Michigan Supreme Court by not granting a leave to appeal has allowed this decision to stay, thereby leaving no other alternative but to file a petition for writ of certiorari to this Court. A litigant who is stymied by a state procedural ruling from which he cannot appeal may ask this Court to review that ruling. *See Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554 (7th Cir. 1986).

This Court has held that a denial of due process is to be tested by an appraisal of the "totality of facts" in a given case. *Gideon v. Wainwright*, 372 U.S. 335, 339, 83 S.Ct. 792 (1963). The "totality of facts" in this case demonstrates that the plea taking procedure in the District Court was nothing but a farce:

First, the District Court throughout the plea-taking proceeding used contradictory phrasings concerning whether the plea was "under advisement" or "accepted";

Second, the District Court then specifically informed Caccamo that his plea remained "under advisement":

> The Court: Mr. Caccamo is going to plead no contest to a charge of domestic violence and ***it will***

> ***be taken under advisement*** as long as he completes his sentence satisfactorily. (*emphasis added*) (App – 47).

Third, a few minutes after stating that the plea remained "under advisement", the District Court stated that it would accept the no contest plea:

> The Court: . . . I will ***accept*** the no contest plea. (*emphasis added*) (App – 51).

Fourth, the District Court again misinformed Caccamo that he could send a copy of the order of dismissal to the state police and get the charges "cleansed";

Fifth, the District Court misinformed Caccamo that there would be no permanent record of the conviction (the statute under which Caccamo was pleading no contest, MCL 769.4a(6), specifically provides that "the department of state police *shall* retain a nonpublic record of an arrest and discharge or dismissal under this section" (*emphasis added*)).

Throughout the plea-taking procedure, the District Court continued to use contradictory language in taking the plea "under advisement" and "accept[ing]" the plea. Michigan courts have held that until the court ***accepts*** the plea on the record, the accused may withdraw it as a matter of right. *People v. Serr*, 73 Mich. App. 19, 250 N.W.2d 535 (1976). This Court has also held that a defendant may not withdraw his plea of guilty or *nolo contendere* as a matter of right once the plea has been ***accepted*** by the court. *See United States v. Hyde*, 520 U.S. 670, 117 S.Ct. 1630 (1997); *Neely v. Pennsylvania*, 411 U.S. 954, 957, 93 S.Ct. 1934 (1973).

When does a court "accept" the plea? As an analogy, a decision by the Michigan Court of Appeals, under MCR 5.941(D), which also allows a court to take a *nolo contendere* plea under advisement, is helpful. In *In the Matter of Raphael Hastie, Minor,* 2000 WL 33521081 (Mich. App. 2000), the Michigan Court of Appeals held:

> "Respondent next argue[ed] that the trial court's acceptance of respondent's plea before he had completed his treatment program, and the court's refusal to allow respondent to withdraw the plea, constituted an abuse of discretion. . . . We disagree . . . a trial court 'may take a plea of admission or of no contest under advisement. Before the court accepts the plea, the juvenile may withdraw the plea offer by right. After the court accepts the plea, the court has discretion to allow the juvenile to withdraw a plea.' Respondent attempts to characterize his request to withdraw his plea as having come before the court actually accepted it, which the court would then, under the court rule, have been obliged to allow as a matter of right. However, our review of the record persuades us to reject respondent's characterization. . . .
>
> At the proceeding in question, the trial court recognized the troubling evidence that respondent was not responding to treatment and remained a danger to the community. ***It then stated that it was accepting the plea that it had long held under advisement. Only at this point did respondent move to withdraw the plea.*** . . . Thus, respondent moved to withdraw the plea after it was accepted, not before. . . ." (*emphasis added*).

If a trial court takes a plea "under advisement" to allow an opportunity to a defendant to satisfy certain conditions, the plea is not automatically "accepted" on the record. The court, after providing adequate time for defendant to satisfy those conditions, thereafter has to make a conscious effort to "accept" the plea. Until that effort is made, the plea remains under advisement and a defendant is free to withdraw it anytime before its formal "acceptance" by the court. The Michigan Supreme Court has held:

> "Taking a matter under advisement indicates an end to the legal proceedings and a subsequent time for deliberation. The order finally entered must be supported by the facts of file and record at the time of the hearing . . . Here the judge could have entered a termination order at the end of the disposition hearing, *but he held the case under advisement. . . .*" *Doe v. Mitchell*, 397 Mich. 225, 238, 244 N.W.2d 827 (1976) *overruled on another issue by* 441 Mich. 23, 490 N.W.2d 568 (1992) (*emphasis added*).

Also, in an unpublished and sealed case, a federal district court in Michigan, reached a similar conclusion:

> "While the plea is under advisement, the defendant is still presumed innocent. . . . the defendant would not be 'found guilty' at that pertinent point in time."
>
> (App – 70).

In the present case, Caccamo's plea could not be "accepted" by the District Court until and unless Caccamo fulfilled the conditions. The trial judge made affirmatively misleading statements that would lead any reasonable

man to believe that his plea was being taken "under advisement":

> The Court: Mr. Caccamo is going to plead no contest to a charge of domestic violence and ***it will be taken under advisement as long as he completes his sentence satisfactorily***. (*emphasis added*) (App – 47).

Caccamo, while tendering his plea, was under an impression that the plea was being taken "under advisement" and before it was "accepted," Caccamo would be required to satisfy certain conditions. Further, *the fact that Caccamo was under this impression was known to the trial judge*. Before the court "accepted" the plea, Caccamo's counsel stated his (and therefore, Caccamo's) understanding of an "under advisement" plea:

> Mr. Lakin: It's – It's my understanding through Mr. McConnell and I – we've had lengthy, lengthy discussions about this. When your Honor calls this a sentencing, that you're not going to accept his plea and – and as such, you're going to take the matter under advisement for a certain period of time. (App – 50).

This statement should have made it clear to the trial judge that Caccamo's plea was not made understandingly and that Caccamo was laboring under a different impression. Instead of stopping the plea hearing and instructing or allowing Caccamo to confer with his counsel to resolve any misunderstandings, the court summarily dismissed this issue:

> The Court: That is not – that's not our procedure at all.

(App – 50).

The trial judge left Caccamo with an impression that *until* he complied with the terms of probation, the plea was under advisement and hence, could be withdrawn at any time. In fact a recent decision of Michigan Court of Appeals while not directly on that point supports this argument. *See Carr v. Midland County Concealed Weapons Licensing Bd.*, 259 Mich. App. 428, 433, 674 N.W.2d 709 (2003).

Further, the District Court appeared to believe that since this was a misdemeanor issue, Michigan Court Rule ("MCR") 6.610 and not 6.302 would govern the proceeding – thereby implying that some difference in the quality of the plea-taking process may be permitted (App – 8). However, MCR 6.610 does not contain *any* provision regarding acceptance of pleas under advisement. In that circumstance, MCR 6.302 would prevail. Consider what the Commentary to MCR 6.302 advises about accepting a plea under advisement:

> **"If, however, the court takes a plea agreement under advisement, the plea is not accepted and the defendant has the right under 6.310(A) to withdraw the plea 'until the court accepts it on the record.'** If the court accepts the agreement conditionally or takes the plea agreement under advisement, it must inform the defendant that the court is not bound to follow the sentence agreement, but that the defendant will be allowed to withdraw the plea in the event that the court does not follow it . . . " *Id.* (*emphasis added*).

The important thing to remember is that where liberty interests are concerned, there cannot be any difference in the quality of the process based merely on the difference in sanctions. Therefore, just because the underlying charge is a misdemeanor and not a felony, does not make an otherwise invalid and unconstitutional plea-taking procedure constitutional.

> "The Fourteenth Amendment requires due process of law for the deprival of 'liberty' just as for deprival of 'life,' and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved." *Gideon v. Wainwright*, 372 U.S. 335, 349, 83 S.Ct. 792 (1963).

Other courts have held that when an accused establishes "good reason" for the requested withdrawal, such as the existence of misrepresentations inducing the plea, it would be an abuse of the judge's discretion to deny the motion to withdraw the plea. *See e.g. United States v. Leonard*, 16 M.J. 984, 986 (ACMR 1983) *citing United States v. Crowley*, 529 F.2d 1066 (3d Cir. 1976); *United States v. Barker*, 514 F.2d 208 (D.C. Cir. 1975).

Several other state courts of last resort have clearly held that where a defendant labors under a mistake or misrepresentations or *confusing statements made by the judge*, sufficient grounds exist for withdrawal of the plea. *See State v. DeZeler, supra*; *et al.*

This court has held that trial judges, in every case, must be meticulous and precise in following each of the requirements of the rule on withdrawal of a plea. *Peguero v. U.S.*, 526 U.S. 23, 28, 119 S.Ct. 961 (1999).

A trial judge who accepts a guilty or no contest plea ***must*** establish that the defendant fully knows and understands he is waiving his right to trial before judge or jury and freely and voluntarily waives such rights. The Michigan Court Rule 6.610(E) applicable to the present case, before accepting a plea, clearly mandates "the court ***shall*** determine that the plea is *understanding*, *voluntary*, and *accurate*." (*emphasis added*).

The District Court not only failed to explore whether Caccamo's plea was "understanding" and "voluntary" but further compounded the problem by making inaccurate, contradictory and confusing statements.

A guilty plea should not be allowed to stand if the defendant upon reflection or additional developments seeks in good faith to exercise his right to trial. *Neely v. Pennsylvania*, 411 U.S. 954, 957, 93 S.Ct. 1934 (1973).

II. THIS COURT SHOULD REVIEW THE MICHIGAN COURT OF APPEALS' DECISION, WHERE IN SUMMARILY REJECTING PETITIONER'S FEDERAL CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE STATE COURT DID NOT REST ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

This Court has jurisdiction to review a state law decision where the state court's decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.

> ". . . . when a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, this Court will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. . . ." *Michigan v. Long*, 463 U.S. 1032, 1032-1033, 103 S.Ct. 3469 (1983).

Throughout the proceedings in Michigan courts, Caccamo has repeatedly claimed a violation of his ***federal*** Constitutional right to counsel as afforded by the Sixth Amendment to the United States Constitution and its counterpart in the Michigan's Constitution. This claim was asserted in Caccamo's Motion to Withdraw the Plea filed in the District Court; Appeal Brief filed in the Circuit Court; Reply Brief filed in the Michigan Court of Appeal and Application for Leave to Appeal filed in the Michigan Supreme Court.

The right of an accused to counsel is beyond question a fundamental right. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792 (1963). The Sixth Amendment to the United States Constitution provides the right to the assistance of counsel and that such assistance must be ***effective.*** *See Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *People v. Pickens*, 446 Mich. 312 (1995); U.S. Const., Amends. VI, XIV; Mich. Const. 1963, art. 1, §20. Caccamo's claim of ineffective assistance of counsel was made before the Circuit Court, the Michigan Court of Appeals and the Michigan Supreme Court. A *nolo contendere* plea does not waive a claim of ineffective assistance of counsel. *See Kimmelman v. Morrison*, 477 U.S.

365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *People v. McDonnel*, 91 Mich. App. 458, 460-461, 283 N.W.2d 773 (1979), leave den., 407 Mich. 938 (1979).

The Michigan Court of Appeals, after considering Caccamo's claim of ineffective counsel, summarily dismissed it (App – 2). The court did not cite any authority, state or federal, for its obscure rejection of the ineffective-assistance-of-counsel claim but instead ruled that it appeared that Caccamo sought to withdraw his plea due to sentencing concerns.

This Court has held:

> it is . . . important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action
>
> *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469 (1983).
>
> This Court has frequently held that in the exercise of its appellate jurisdiction it has the power not only to correct errors of law in the judgment under review but also to make such disposition of the case as justice requires. . . . That principle has been applied to cases coming from state courts . . . where the record failed adequately to state the facts underlying a decision of the federal question, and where the grounds of the state decision were obscure.
>
> *Minnesota v. National Tea Co.*, 309 U.S. 551, 556, 60 S.Ct. 676 (1940).

> . . . state courts will not be the final arbiters of important issues under the federal constitution . . .
>
> *Minnesota v. National Tea Co.*, 309 U.S. 551, 557, 60 S.Ct. 676 (1940).

The Michigan Court of Appeals decision in no way indicates that in rejecting Caccamo's claim of violation of his federal Constitutional right, it rested on an adequate and independent state ground. In absence of a plain statement that the decision of a state court rested on an adequate and independent state ground, this Court has jurisdiction to review the decision. *Michigan v. Long*, 463 U.S. 1032, 1044, 103 S.Ct. 3469 (1983). For example, where a state court determined that a defendant had waived his ineffective-assistance-of-counsel claim under the state's specific rule of criminal procedure, this Court declined to exercise jurisdiction as the state's decision was based independent of federal law. *Stewart v. Smith*, 536 U.S. 856, 861, 122 S.Ct. 2578 (2002). In this case, the Michigan Court of Appeals did not base its decision on any independent state law or rule. Therefore, the Michigan Court of Appeals summary rejection of Caccamo's claim of ineffective assistance of counsel pursuant to the Sixth Amendment to the United States Constitution must depend on the court's interpretation of the federal law. *See Ake v. Oklahoma*, 470 U.S. 68, 69, 105 S.Ct. 1087 (1985). When the adequacy and independence of any possible state law ground is not clear from the face of the opinion, this Court must accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. *Michigan v. Long*, *supra* at 1033. Also, where the non-federal ground is so interwoven with the federal ground as

not to be an independent matter, this Court's jurisdiction is plain. *Ake v. Oklahoma*, *supra* at 75.

The record in this case demonstrates that Caccamo's counsel had made numerous and serious misrepresentations.[3] Caccamo's several affidavits that are a part of the record state that:

- Mr. Lakin assured Caccamo that his case was "a slam dunk" with 99.99% chance of acquittal (if that is not a promise, it is hard to fathom what would be);
- Mr. Lakin told Caccamo that the deal was "No contest with 6 months non-reporting probation, under-advisement with no mention of DV classes, fines, costs, etc." (instead, what he received was 12 months of probation with fines, costs, classes);
- Mr. Lakin made an affirmative misrepresentation to Caccamo numerous times that he was *not* pleading under MCL 769;
- Mr. Lakin made an affirmative misrepresentation to Caccamo that "No Contest" is not at all considered a guilty plea (taking advantage of Caccamo's legal naïveté);
- Caccamo instructed Mr. Lakin *prior to* and during sentencing (as well as after) to withdraw the plea. Lakin refused, even stating "Look. I am not withdrawing that plea. You're going to make us both look like fools," and Mr. Lakin ordered Caccamo to "shut-up"

[3] Also, Caccamo's *Motion for Rehearing* filed in the Michigan Supreme Court contained Caccamo's sworn statement and a copy of audio CD of the conversations between Caccamo and Lakin.

as he wasn't about to lose credibility with the court;

- Mr. Lakin was far more interested in not "rocking the boat" with this case, thereby preserving his ability to plead out future clients.

(App – 88-91).

Caccamo was denied effective assistance of counsel because defense counsel's affirmative misrepresentations resulted in an unknowing plea. Counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant under the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984).

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), this Court set forth the test to be used in reviewing claims of ineffective assistance of counsel. First, defendant must show that counsel's performance was deficient. Second, the deficiency must be prejudicial to the defendant. *Id.* at 691-692. Apart from the affirmative misrepresentations made by counsel, he was clearly deficient in representing and guiding Caccamo through the plea-taking procedure.

At the start of the plea hearing, the District Court offered Lakin some time to confer with Caccamo. Lakin passed up the offer.

"Mr. Lakin: Is there a plea form in the file that we have to sign?

The Court: There is.

Mr. Lakin: If I could just go over it with him.

The Court: Okay. Well, you want to take some time with him?

Mr. Lakin: No. ***We already know what it is.***"

(App – 46) (*emphasis added*).

What counsel meant to "already know" about the plea was that he had advised Caccamo that the plea was going to be taken "under advisement" and that Caccamo could later withdraw his plea if he so wished. This is evident from counsel's statements to the District Court:

> Mr. Lakin: It's – It's my understanding through Mr. McConnell and I – we've had lengthy, lengthy discussions about this. When your Honor calls this a sentencing, that you're not going to accept his plea and – and as such, you're going to take the matter under advisement for a certain period of time. (App – 50).

The Court disagreed.

> The Court: That is not – that's not our procedure at all.
>
> Mr. Lakin: I understand, but –
>
> The Court: It is a sentencing. He will be sentenced on these charges. When he comes back he probably, because it's an under advisement plea, of course, there's no likelihood of me putting him in jail, but he'll be placed on probation for a period of time. . . . And at the completion of his term, after his fines are paid and he's done whatever I ask him to do, then the offense is dismissed. We give you an order of dismissal. You can send it to the State Police and get this thing cleansed.
>
> Mr. Lakin: All right. Thank you.
>
> (App – 50-51).

At this moment, counsel clearly knew that the plea agreement that he and his client were prepared to accept (and that he had advised his client about) was ***not*** the plea that the court was taking. Counsel should have stopped the plea-taking process at that stage. Further, counsel should have informed Caccamo about the important differences between the plea advice that he had earlier given to his client and the radically different "procedure" that was to be followed by the District Court. However, counsel did not do so. Instead, counsel allowed Caccamo to enter a plea that ultimately turned out to be a radically different creature. Caccamo discovered that due to affirmative misrepresentations and lies of his attorney, he had "agreed" to a plea that did not even slightly resemble the one that he was originally made to understand. Counsel's affirmative misrepresentations, incompetence and coercive techniques are well documented in affidavits filed in the Michigan courts.

An ineffective assistance of counsel is a self-standing claim, and the issue can be raised even where the alleged error of counsel can no longer be raised. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). This Court in *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), specifically stated that a defendant can be deprived of his right to effective assistance of counsel at a plea proceeding. *Hill* further stated that the inquiry "will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Id.*

A defendant has a right to rely on the advice of counsel. Caccamo relied on the advice of his attorney concerning the plea. Counsel had a duty to investigate the law and reasonably inform Caccamo of the consequences of his plea

– or at the very least not to make misrepresentations or lie to his client. Counsel's failure to conduct rudimentary research and advise Caccamo on the issue of tendering his plea deprived Caccamo of his right to effective assistance of counsel. *See e.g. United States v. Kauffman*, 109 F.3d 186 (3d Cir. 1997) (finding that the defendant's plea had to be vacated where counsel failed to properly investigate exculpatory defenses). "While counsel is entitled to substantial deference with respect to strategic judgment, an attorney must investigate a case, when he has cause to do so, in order to provide minimally competent professional representation." *Id.* at 190. This Court has held:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."
>
> *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792 (1963).

Michigan Court of Appeals' conclusion that the petitioner sought to withdraw his plea due to "sentencing concerns" is frankly, baffling (App – 4-5). Why would this

former United States Marine, currently on active reserve, go to these lengths – contest these proceedings through the District Court – the Circuit Court – the Michigan Court of Appeals – the Michigan Supreme Court and now, this Honorable Court, spend enormous time, resources and money, if he was merely displeased with the sentence that *he already has completed*? It was a sentence that only required him to attend a weekend class and pay fines. A trial presents the possibility of incarceration should the plea be allowed to be withdrawn! The actions of this petitioner clearly protest his innocence and his frustration by the failure of the legal system to grant him "his day in court." After all,

> "Justice cannot fulfill its ends when deprived of its own proper excellence." Plato, the Republic, Book One.

CONCLUSION

The Court should grant the petition for writ of certiorari and reverse the decision of the Michigan Court of Appeals.

Respectfully submitted,

DEMOSTHENES LORANDOS, PH.D., J.D.
Counsel of Record for Petitioner
D. LORANDOS, PH.D., J.D., P.C.

ASHISH S. JOSHI
Associate Attorney
D. LORANDOS, PH.D., J.D., P.C.
214 North Fourth Avenue
Ann Arbor, MI 48104
(734) 327-5030

STUART G. FRIEDMAN
Co-Counsel for Petitioner
843 Penniman Avenue
Plymouth, MI 48170
(734) 662-4070

Order

October 31, 2005

128833

Michigan Supreme Court
Lansing, Michigan

Clifford W. Taylor,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE
CITY OF WESTLAND,

Plaintiff-Appellee,

v

TODD STEPHEN
CACCAMO,

Defendant-Appellant. /

SC: 128833
COA: 255336
Wayne CC: 03-500089-FM

On order of the Court, the application for leave to appeal the February 15, 2005 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

[SEAL] I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 31, 2005 /s/ Corbin R. Davis
Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE CITY OF WESTLAND,	UNPUBLISHED February 15, 2005
Plaintiff-Appellant,	No. 255336
v	Wayne Circuit Court LC No. 03-500089-FM
TODD STEPHEN CACCAMO,	
Defendant-Appellee.	

Before: Kelly, P.J., and Saad and Smolenski, JJ. PER CURIAM.

The prosecution appeals by leave granted the circuit court's order reversing the 18th District Court's order denying defendant's motion to withdraw his plea of nolo contendere for a violation of a misdemeanor domestic violence ordinance, Westland City Code, Section 68-67(a). We vacate the circuit court order and reinstate the district court order.

The prosecution argues that the circuit court erred in reversing the district court's order denying defendant's motion to withdraw his plea of nolo contendere. The circuit court ruled that the district court failed to make a determination regarding the voluntariness of defendant's plea of nolo contendere as required by MCR 6.610(E). We review for an abuse of discretion a trial court's ruling on a motion to withdraw a plea. *People v Wilhite,* 240 Mich App 587, 594; 618 NW2d 386 (2000). A trial court abuses its discretion when an unprejudiced person, considering the facts on which the trial court acted, would conclude that

there was no justification or excuse for the ruling. *People v Ullah,* 216 Mich App 669, 673; 550 NW2d 586 (1996).

Based on our review of the record, we conclude that the district court complied with the requirements of MCR 6.610(E) in taking defendant's plea. Contrary to the ruling of the circuit court, the Michigan Supreme Court held that a court's determination that a plea was made "understandingly and voluntarily" is not required to be made in "any particular manner." *Guilty Plea Cases,* 395 Mich 96, 126; 235 NW2d 132 (1975). Rather,

> The judge's determination that the plea is freely, understandingly and voluntarily made may be concluded from the judge's acceptance of the plea even though he makes no separate finding of fact on this issue. [*Id.*]

The record reflects the that district court explicitly and repeatedly questioned defendant about his understanding and desire to make a nolo contendere plea. The court also properly informed defendant of the consequences of his plea and its treatment by the court "as if you plead[ed] guilty." Defendant clearly and consistently indicated his agreement with the proceedings and the plea of nolo contendere. At sentencing, defense counsel indicated that defendant knowingly waived his rights to trial and made a conscious decision to proceed with entry of the plea. Therefore, we conclude that the trial court properly determined that defendant's plea was "understanding, voluntary, and accurate." MCR 6.610(E).

We also disagree with defendant's contention that there was a discrepancy regarding whether the trial court accepted defendant's plea. At the plea hearing, defense counsel voiced his misunderstanding that, "When your

Honor calls this a sentence, that you're not going to accept his plea and – and as such, you're going to take the matter under advisement for a certain period of time." To which the district court replied, "That is not – that's not our procedure at all." Thereafter, the trial court clearly stated:

> All right. I'm going to read the incident report 03-4236 for a factual basis. All right. I'm satisfied there is a factual basis for these charges. I will accept the no contest plea. I assume the no contest is because of civil – potential liability, is that correct?

Furthermore, "[b]y sentencing the defendant the judge implicitly accepted the plea." *Guilty Plea Cases, supra* at 126. At the sentencing hearing, the district court provided defendant with an opportunity to speak before being sentenced. But defendant elected not to speak.

After the district court accepted defendant's plea and sentenced defendant, defendant's newly retained counsel filed a motion to set aside the plea arguing that defendant's prior counsel misled defendant regarding the ability to withdraw the plea. When the district court permitted defendant to express his reasons for seeking to withdraw his plea, he stated, "The biggest concern . . . this woman is not letting this thing go." Defendant also expressed his concern with the potential recommendations that would be made by the domestic violence class instructors. Defendant stated, "other counsel has said that basically unless you go to this class and admit that you're a monster then they make these recommendations – that you could be taking classes for the next year, your Honor."

Despite the contentions of defense counsel in the circuit court and defendant's contentions on appeal, this

record indicates that defendant, after entering his plea, became concerned with collateral consequences and his sentence to attend a domestic violence class. "Requests to withdraw pleas are generally regarded as frivolous where circumstances indicate that the true motivation behind the motion is sentencing concerns." *People v Ward,* 459 Mich 602, 614; 594 NW2d 47 (1999), corrected by 460 Mich 1204 (1999). We conclude that the district court did not err in denying defendant's motion to withdraw his plea of nolo contendere.

The circuit court order is vacated and the district court ruling is reinstated. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Henry William Saad

/s/ Michael R. Smolenski

STATE OF MICHIGAN

IN THE 3rd CIRCUIT COURT
FOR THE WAYNE COUNTY

THE PEOPLE OF THE CITY OF WESTLAND,	Appellate No. 03-500089-FMHJ
Plaintiff-Appellee,	Trial Court No. 03-900588
-vs-	HON. VERA MASSEY-JONES
TODD CACCAMO;	
Defendant-Appellant.	

Mark McConnell P 46434 Attorney for Plaintiff 35330 Nanking Blvd, Ste. 702 Westland, Michigan 48185 (734) 421-5510	Demosthenes Lorandos, Ph.D. P45005 Attorney for Defendant 214 North Fourth Avenue Ann Arbor, Michigan 48104 (734) 327-5030

ORDER

(Filed Jan. 30, 2004)

This cause having come on to be heard on Defendant-Appellant's Appeal, the parties having appeared by and through their counsel, the Court having heard arguments of counsel and being otherwise advised in the premises:

IT IS ORDERED for the reasons stated on record, Defendant-Appellant's Appeal is granted, Defendant-Appellant's plea is withdrawn and matter is returned to the District Court for proceedings consistent with this Order.

/s/ Vera Massey-Jones
Vera Massey-Jones
Circuit Court Judge

This Order is drafted by:

/s/ D Lorandos (AJ)
Demosthenes Lorandos, Ph.D., P45005
Attorney for Defendant
214 North Fourth Avenue
Ann Arbor, Michigan 48104

Approved as to content and form by:

/s/ Mark McConnell (w/permission)
Mark McConnell P 46434
Attorney for Plaintiff
35330 Nanking Blvd, Ste. 702
Westland, Michigan 48185
(734) 421-5510

STATE OF MICHIGAN

IN THE DISTRICT COURT
FOR THE 18TH JUDICIAL DISTRICT

THE PEOPLE OF THE
CITY OF WESTLAND,

V

Case No. 03-900588

TODD STEPHEN CACCAMO

Defendant. /

OPINION

Defendant has filed a motion for reconsideration of the Court's earlier opinion to prevent the withdrawal of Defendant's plea after sentencing. The Defendant entered a plea of no contest to a charge of domestic violence on May 9, 2003, and was sentenced on June 25, 2003. Defendant was initially represented by Attorney Matt Savich, but at the time of the plea a substitution had occurred and Attorney Marc R. Lakin represented the Defendant.

A motion to set aside Defendant's no contest plea was filed on behalf of the Defendant by Defendant's third attorney, Christopher Drouillard, and heard by the Court on August 19, 2003, at which time the motion was denied. On September 3, 2003, Defendant filed a motion in pro per to request the Court's reconsideration of motion to withdraw plea.

Defendant first claims that the Court failed to follow the requirements of MCR 6.302 in accepting the no contest plea. Pleas in the District Court, however, are governed by MCR 6.610 and not by MCR 6.302. A review of the plea transcript indicates that the Court had fully complied with the requirements of 6.610.

The Defendant further contends that he is entitled to withdraw his plea because the plea was taken under advisement and that sentence does not occur until the end of his under advisement period. Defendant seems to be confusing a deferred sentence with probation. Being placed on probation is different from a deferred sentence. *People* v *Leonard*, 144 Mich App 492 (1985), *People* v *Hackers,* 127 Mich App 796 (1983). In this case, the Defendant's plea was accepted on the record and the Court imposed a sentence. The under advisement status granted to the Defendant refers to what ends up on his record, but the probation is, in fact, an actual sentence. *People* v *Moon*, 125 Mich App 773 (1983). *See also People* v *Saylor*, 88 Mich App 270 (1979).

Defendant is under the mistaken belief that he has not been sentenced in this case because the plea was taken under advisement. The sentence in this case has been imposed and Defendant enjoys the right to have the conviction stay off his record if he satisfactorily completes all the terms of his probation. This is what the under advisement status means.

In addition, Defendant takes issue with the representation provided by Attorney Lakin. If we are to read into his motion a claim of ineffective assistance, Defendant bears the burden of proving his claim. To prevail on a claim of ineffective assistance, the Defendant must overcome the presumption of effective assistance. Ineffective assistance will not be found on appeal simply on a difference of opinion over tactics. *People* v *Toma*, 462 Mich 281, 613 NW2d 694 (2000), *People* v *Lloyd*, 459 Mich 433, 590 NW2d 738 (1999), *People* v *Van Brocklin*, 76 MichApp 427, 257 NW2d 107 (1977).

The Michigan Supreme Court established in *People* v *Garcia,* 398 Mich 250, 247 NW2d 547 (1976), a bifurcated test for ineffective assistance of counsel claims. First, defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law. *People* v *Stubli*, 163 Mich App 376, 413 NW2d 804 (1987). Secondly, even though the first test is satisfied, counsel must not make a serious mistake but for which the Defendant would have a reasonably likely chance of acquittal. *Id.* at 378, 413 NW2d at 806. The record does not support Defendant's contention that he was misled by Attorney Lakin since he confirmed to the Court that he understood the charges against him and all the rights he was giving up. Where there is no indication on the record that the plea was coerced, the plea is considered voluntarily. *People* v *Saylor*, *Id.* at 273.

Defendant further contends that Michigan's domestic violence statute is too vague and does not clearly prescribe conduct in which these parties were engaged. This issue was never raised at trial or before this motion for reconsideration was filed. However, while Defendant relies on *Oriola* v *Thaler*, a California case at 84 Cal App 4th, 397, the Court believes Defendant misreads the *Oriola* case. While the Oriola Court refused to define the dating relationship on the basis of sex, this Court need not endeavor to make such a connection. In Michigan, domestic violence is the causing or attempting to cause physical or mental harm to a family or household member. MCLA 400.1501. Persons in a "dating relationship" or "sexual relationship" are classified as "family or household members." Furthermore, there are no reported Michigan cases that support Defendant's contention with regard to this issue.

A motion for reconsideration pursuant to MCR 2.119 will not be granted unless the moving party demonstrates a palpable error by which the Court and the parties have been misled and shows that a different disposition of the motion must result. Defendant has failed to make such a showing.

Defendant's motion for reconsideration is denied.

/s/ C. Charles Bokos
C. CHARLES BOKOS,
District Judge

Dated: September 22, 2003.

STATE OF MICHIGAN
COUNTY OF WAYNE
THIRD JUDICIAL CIRCUIT COURT –
CRIMINAL DIVISION

THE PEOPLE OF THE
CITY OF WESTLAND,

vs. Case No. 03-500089

TODD CACCAMO,

Defendant. /

HEARING

BEFORE THE HONORABLE VERA MASSEY JONES
CIRCUIT COURT JUDGE

Detroit, Michigan – Friday, January 30, 2004

APPEARANCES:

For City of Westland:

MARK A. McCONNELL (P46434)
Angelo A. Plakas and Associates, P.C.
Nankin Boulevard Professional Center
35330 Nankin Boulevard, Suite 702
Westland, Michigan 48185-7223
(734) 421-6740

For the Defendant:

DEMOSTHENES LORANDOS (P45005)
214 N. Fourth Avenue
Ann Arbor, Michigan 48104-1404
(734) 327-5030

Court Reporter: JANICE I. PAYNE, CSMR 3521
(313) 224-2487

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WITNESSES:

NONE

EXHIBITS:

NONE MARKED ADMITTED

[3] Detroit, Michigan

Friday, January 30, 2004

At about 9:45 a.m.

(All parties present.)

THE CLERK: Case number 04-500089; People versus Todd Caccamo.

MR. McCONNELL: Good morning, your Honor. Mark McConnell on behalf of the People of the City of Westland.

MR. LORANDOS: Good morning, your Honor. Demosthenes Lorandos on behalf of Appellant-Defendant Todd Caccamo.

THE COURT: Okay.

MR. LORANDOS: This is the time set for oral argument with the Court's permission.

THE COURT: Yes, and I had – I make notes on things, and I can't find my notes right now. Wait a minute, because there was something specific I wanted.

If I remember correctly, what I found here – this was a nolo plea; right?

MR. LORANDOS: Yes, ma'am.

THE COURT: There was a problem in the Judge's recitation of the rights the client was giving up in an inquiry. I don't believe he made any inquiry about whether or not he had been threatened or promised [4] anything.

MR. LORANDOS: That's correct, your Honor.

THE COURT: Because I can't – and, see, I really wish, when I read the transcripts I could get people in here the next day, because then I remember it a whole lot better.

MR. LORANDOS: It's described in detail on page 11 through page 14 of the appellant brief. To be certain, the appellant's brief, your Honor.

THE COURT: Here, wait a minute. Wait a minute.

MR. LORANDOS: And the transcript citations are given to your Honor.

THE COURT: No, I'm looking at – I read the transcript of the plea itself.

MR. LORANDOS: Thank you.

THE COURT: All right. First of all, I had my clerk try and find the plea form. There is a plea form. I can't even read whose signature is on it. But the plea form doesn't detail any specific rights that would have covered this.

And as I read very carefully, and I think the Court might have been doing some other matters at the same

time, and I think – because sometimes people will just walk past, you know, take [5] away your concentration for a moment.

But I could not find in this transcript anyplace where he was inquired as to whether anybody had threatened him or promised him anything.

MR. LORANDOS: That's correct, your Honor. That's missing.

MR. McCONNELL: Your Honor, that's not a requirement for a misdemeanor. The court rule –

THE COURT: Well, when I read the court rule –

MR. McCONNELL: The court rule that's cited by the Defense is the court rule that applies to pleas that are taken in this Court.

We cite in our brief the rules that are applied to misdemeanors that are handled in the district court, and nowhere in that court rule –

THE COURT: And what rule is that?

MR. McCONNELL: That is –

THE COURT: Because when I read it, I thought it said it refers back to the rule that we use here. At least that's what I thought I read.

MR. McCONNELL: Which is 6.610(E)(3).

THE COURT: 6.610(E).

MR. McCONNELL: Correct; subparagraph 3.

THE COURT: "Guilty plea." Okay. Excuse me. [6] Do I see 6.610(E) – doesn't paragraph 1 also apply to a plea taken in the district court?

MR. McCONNELL: I don't have the court rules right in front of me.

THE COURT: Okay. It says right here: "A plea of guilty or no contest" – and this is under 6.610 – "Before accepting a plea of guilty or no a contest, the Court shall, in all cases, comply with this rule. (1) The Court shall determine that the plea is understandingly voluntary and accurate."

Now, how do you determine it's voluntary unless you ask whether or not someone was threatened or promised anything?

And here, I'll show it to you because it's right here in the court rule, 6.610.

Hand this to him because he doesn't have it.

As I remember – I started my career on the bench as a referee in the old traffic court. As I remember, the only real difference between the misdemeanor pleas and a felony plea was that in a misdemeanor plea, you didn't always have to get a factual basis at one time. Somebody could just come in and plead to the assault and battery. And as long as you gave them all their rights, that was it.

[7] But you've got to give them all their rights, and you've got to be sure the plea is voluntary. And as I read that MCR 6.610, that is one of the requirements.

And I'm quite sure that this magistrate, or this Judge, District Judge, probably does it in every case. But I think

there were a lot of things – I got the impression from reading this transcript that a lot of things were going on at that time, and he just neglected to ask him about that.

And so, I'll listen to any further argument. But after that, I think I'm going to have to remand this for the retaking of a plea.

MR. LORANDOS: Your Honor, may the appellant speak?

THE COURT: Yes.

MR. LORANDOS: Your Honor, we respect and enjoy a good relationship with the District Court. Gail McKnight and Judge Bokos have been more than kind on many occasions. Certainly, the Court is correct. It's my reading as well, there was a lot going on.

And the defendant-appellant would like to make it clear to the Court that domestic violence is an aberration and an abhorrence in our society, and its eradication is devoutly to be . . .

This isn't about a domestic violence. It's about mistakes, and it's about a lawyer that did not serve the Court well. He made a thousand dollars an hour by forcing this defendant into this plea.

THE COURT: Well, now, I don't know about that, and I don't want to hear all this disparaging stuff about a lawyer who's not here to defend himself.

MR. LORANDOS: Right.

THE COURT: And I don't – because I don't think you'd like it after you left here if somebody else came in and did that to you.

MR. LORANDOS: Yes, ma'am, you're right.

THE COURT: Now, especially when you're winning.

What is it you want the Court to know?

MR. LORANDOS: That I thank the Court for its consideration and its time.

THE COURT: Okay. I'm waiting to hear if the People have anything else that they can say.

MR. McCONNELL: Your Honor, I also believe that the Court is correct, and that there was a written Advice of Rights that was signed by the defendant in this case that was in the lower court record.

THE COURT: And, you know, but that's there. We looked at it. And if you read what's on that – I [9] would suggest that they change the form that they use. It doesn't say anything about no threats, or that it was voluntary.

Because first of all, we had an awful hard time finding it. And we finally did find it, but it doesn't say one word – let me see if I can pull it out. Here it is.

This is what I was told is – because I thought that would solve my problem if I could find the plea form.

Now, even if this is his signature, there is nothing on here about voluntariness.

MR. McCONNELL: No. There's a full form that gives out – lays out what that person's rights are. It's an Advice of Rights form. That's the plea form that we write

up when a person takes a plea. It's not the Advice of Rights form.

THE COURT: Okay.

MR. McCONNELL: There is an Advice of Rights form in the file.

MR. LORANDOS: Not that I've seen. Have you got one?

THE COURT: Yeah, I'd like to see it, because maybe I missed it. One that where he signed, in any way, shape, form, or fashion?

[10] MR. McCONNELL: Correct.

THE COURT: Okay.

MR. McCONNELL: I don't know if I made a copy of that. I assumed that the whole file would be sent down here.

THE COURT: Well, you know, I've got to tell you, we looked at a lot of different stuff. I tried to be sure about what was here.

(Court perusing file.)

THE COURT: I'll tell you what, I'm going to give you the court file and let you sit down. We'll call it back in a few minutes. If you can show me where that form is in here, and that he signed it, then I may change my opinion.

But I looked through everything to try and be sure that someplace along the line he had indicated that he had not been threatened or promised anything, and I couldn't find it.

So, here, Marilyn. Let the prosecutor have the court file.

And, Counsel, if you'd just have a seat for a few moments.

MR. LORANDOS: Sure.

MR. McCONNELL: Your Honor, if I could add just on that argument?

[11] THE COURT: Yeah.

MR. McCONNELL: The rule with respect to felonies does specifically require that a determination be made where the defendant is asked whether anyone has promised the defendant anything, or whether anyone has promised anything beyond what is in the plea agreement, or whether they have been threatened.

THE COURT: I admit that.

MR. McCONNELL: I think because it is intentionally left out of the other rule, that the rules of statutory construction would apply, and would then, therefore, not require on a misdemeanor-type plea.

THE COURT: Well, then, how do you determine it's voluntary? You point to me where it shows that it was voluntary.

MR. McCONNELL: How it was voluntarily made by the defendant?

THE COURT: Um-hum.

MR. McCONNELL: Well, the fact that he's standing before the Court, and the Court is asking certain

questions of him, and he – "Do you have any questions about the rights that you've waived?" "No."

THE COURT: I guess I'm going to tell you I'm going to disagree with that. Okay?

[12] So, we'll let you take that over to the side and take a look through it. Okay?

MR. McCONNELL: Okay. All right. Thank you, your Honor.

THE COURT: Um-hum.

(At 9:58 a.m., off the record.)

(Whereupon the Court took up other unrelated matters.)

(At 10:11 a.m., back on the record.)

THE CLERK: Recalling case number 03-500089.

THE COURT: Okay. Your appearances once again?

MR. McCONNELL: Mark McConnell on behalf of the People of the City of Westland.

MR. LORANDOS: Demosthenes Lorandos on behalf of defendant-appellant.

THE COURT: Did you find it?

MR. McCONNELL: I found the Advice of Rights form, your Honor, but it does not indicate on the rights form of the voluntariness –

THE COURT: That he signed it.

MR. McCONNELL: That he signed it.

But I would point out to the Court on the last page of our Brief in Response, the case of *People* v *Saffold*, a Michigan Supreme Court case, [13] indicates if it – if from the record it appears the defendant has been informed of his right to a trial, and if this right is being waived by his plea of guilty, reversal is not required by the omission of any of the rights enumerated in the court rule, even the presumption of innocence.

And I think, certainly, that would apply in this situation. He was advised of all of his other rights. The Court didn't make a finding or ask a question with respect to the voluntariness of the plea. But I think implicit in the fact that the individual standing before the Court with an attorney, placing a plea on the record, that that voluntariness can be seen from that fact alone.

THE COURT: Well, there was another thing I noticed. I don't remember in the plea when I read the transcript that there was any reason given for why it was a no contest plea, rather than –

MR. McCONNELL: Potential civil liability.

THE COURT: Oh, that's right.

MR. McCONNELL: That was indicated.

THE COURT: Okay. That was indicated. Okay.

Counsel, I'm telling you, I'm not satisfied. I'm uncomfortable. As I said, I'm uncomfortable with the fact that when I can read the [14] transcript – as I said, I can see a lot of things were going on, and probably the District Judge would have usually asked that question.

And so I'm going to remand it. Set the plea aside and send it back. Okay?

MR. LORANDOS: Thank you, your Honor.

MR. McCONNELL: Thank you, your Honor.

THE COURT: Please file the paperwork for me. Thank you.

THE CLERK: I'm sorry, Judge, what was the ruling?

THE COURT: It's remanded. We've set the plea aside. Send it back.

MR. LORANDOS: Will the Court prepare its order.

THE COURT: No. I asked you to do so. That's what I just said, would you prepare the order for us?

MR. LORANDOS: I beg your pardon. Yes, your Honor. The defendant-appellant would be happy to do that.

THE COURT: Thank you.

MR. LORANDOS: Thank you for your consideration.

(At about 9:58 a.m., proceedings concluded.)

[15] CERTIFICATE OF REPORTER

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

I certify that this transcript, in the matter of The City of Westland v Todd Caccamo, Case Number 03-500089, consisting of 15 pages, is a complete, true, and correct transcript of the proceedings held in this matter on Friday, January 30, 2004.

May 16, 2004 /s/ Janice I. Payne

JANICE I. PAYNE, CSMR 3521
Official Court Reporter
Third Judicial Circuit Court –
Criminal Division
1441 St. Antoine, 9th Floor
Detroit, MI 48226
(313) 224-2487

STATE OF MICHIGAN

18TH JUDICIAL DISTRICT (WAYNE COUNTY)

THE PEOPLE OF THE
CITY OF WESTLAND,

V

Case No. 03-900588

TODD STEPHEN CACCAMO

Defendant. /

MOTION

BEFORE THE HONORABLE C. CHARLES BOKOS,
DISTRICT JUDGE

Westland, Michigan – Tuesday, August 19, 2003

APPEARANCES:

For the People:

For the Defendant: MR. CHRISTOPHER DROUILLARD
P52764
Attorney at Law
38777 Six Mile Road
Livonia, Michigan 48152
(734) 464-0300

RECORDED BY: Carla Franceschi, CER-5272
Certified Electronic Recorder
(734) 595-8720

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WITNESSES: PAGE

None

EXHIBITS:

None

[3] Westland, Michigan

Tuesday, August 19, 2003 – 1:59 p.m.

THE COURT: Case of People versus Todd Caccamo, Case Number 03-900588.

MR. DROUILLARD: Good afternoon, your Honor. Chris Drouillard, appearing on behalf of the Defendant. We've discussed this motion in chambers, your Honor. I've filed a motion, brief in support, as well as affidavit – exhibits, which is an affidavit for Mr. Caccamo detailing events concerning the circumstances of the taking of his plea, in which Mr. Caccamo's contention is that he was misled by his former attorney.

That he – it was not a voluntary plea. He did not know – he was – he was given information to suggest that he could withdraw the plea at any time when, in fact, this was not the case. He wanted to – he wants to withdraw his no contest plea to Domestic Violence at this time. He wants his day in court.

He's continually being harassed by the Complainant, Colleen Kurth. He believes that he can vindicate himself at trial. He's gone through considerable expense in retaining counsel, as well as a jury consultant who's also here from Florida today.

I understand that it's in the Court's discretion to allow Mr. Caccamo to withdraw his plea. He [4] is also – he's underwent psychological evaluation in connection with his attempt to withdraw this plea. And the results of the evaluation are that he is not a violent person.

He was – he passed a polygraph test given regarding the incidents in question here by the – administered to

him by the former head of the F.B.I. polygraph department. And he passed that polygraph test.

He simply wants his day in Court to establish that he is not guilty. Again, if he knew then what he knows now he would never have tendered this no contest plea.

THE COURT: Well, Mr. Drouillard here's the thing. Mr. Caccamo had the benefit of two attorneys. Initially he had retained – actually three. I had, I think, originally assigned the Public Defender. Ultimately he did retain Mr. Matt Savage and after Mr. Savage, retained Mr. Marc Lakin.

Now, while he did enter a no contest plea, I think the Court was rather explicit in explaining to him exactly what a no contest plea was. And in terms of advising him of his rights with regard to that plea, I went over the transcript and I'm pretty confident that what I said was exactly the rights that he has.

I know there was some reference in your – in [5] your motion that I had not advised him of his right to an attorney, but I don't think I have to when he has an attorney standing next to him nor do I have to in a misdemeanor if I don't think I'm going to send him to jail, which I'm not going to do.

This case, I really honestly think you are better served by getting it, behind you than making it even more complex by going through it all again. I don't see that there has been any deviation in the taking of the plea that affects any of your substantial rights. So there's no basis, as far as I'm concerned, for setting the plea aside. The fact that you had a misunderstanding with Mr. Lakin is not, in my opinion, enough to set this plea aside.

What I am willing to do for you is if you complete that Domestic Violence class and pay your fines, you do that before the probationary period expires, I will – I will terminate your probation ahead of time and if you recall correctly part of the plea agreement was that the matter would stay off your record. It was taken under advisement. So I – so you're going to keep this off your record anyway.

Why you would want to set this plea aside and go to trial and go through all that grief and aggravation again is beyond my comprehension, Mr. Caccamo. But I am [6] prepared to – I told your attorney I will shorten the probationary period for you once you have completed this. Once I've talked to my Probation Department, I'd consider shortening your probation period.

If the Complainant is harassing you, you have the same rights, as she has. You can – there's the Police Department here next door. You make the appropriate complaint. If I'm not mistaken isn't she a police officer in Inkster?

MR. CACCAMO: Yes, sir.

THE COURT: Well, I think she stands to lose a heck of a lot more by harassing you than – you know, than we can even talk about here. So, your lawyer – you've got a good lawyer. Mr. Drouillard's an excellent lawyer. He'll tell you exactly what you have to do.

MR. CACCAMO: Well, can I speak?

THE COURT: Sure

MR. CACCAMO: The biggest concern, your Honor is if this was a normal – assuming that whatever happened happened in any way, shape or form, if this was

a normal complainant I would take this thing and run with it, but as Mr. Drouillard pointed out, this woman is not letting this thing go.

In fact, you know even Mr. Lakin said to me, you know, you have nothing to worry about from Judge [7] Bokos, you have to worry about this woman shooting you and your wife one day. And neither here nor there, I would like the opportunity to clear the name because she continues to harass, she continues to contact customers and my name used to be synonymous with – with community service. Now it's synonymous with horrible things. It's horrible.

THE COURT: Well, Mr. Caccamo, there are other ways for you to handle that problem. There are – you have the same rights as she has in terms of getting a personal protection order from the Wayne County Circuit Court, that's a possibility.

If there's a continued harassment of you, you can talk to the Westland Police about the possibility of a stalking warrant. That's a possibility for you. Making threats is also – you can talk to the city attorneys about issuing a misdemeanor warrant. There's all kinds of things that can be done.

You do what I've told you to do and do them quickly and I will terminate this case. It won't be on your record so they – no one can say you have been convicted of anything. So, you have the right if you do what I tell you to do and do it quickly, get it out of the way, pay your fines, get rid of that class, I'll cut you loose early.

[8] MR. CACCAMO: My – my biggest concern –

THE COURT: As far as threats like that, you should take those up with the Police Department. Take them up with her employer. She's – she's – she's employed by the Inkster Police Department, you know, if you feel she's doing things like that to you. A police officer, the last thing in the world that they – they need is someone complaining to their chief about improper conduct on their part. So, you've got all kinds of avenues available to you. Am I going to make this thing go away for you? No.

MR. CACCAMO: What I would ask –

THE COURT: Do you think this is going to go away if we bring it back to trial and try it? Absolutely not.

MR. CACCAMO: What I would ask if this thing is going to be denied, the biggest concern is the class. I mean there's – there's – there's lots of testimony and evaluation from some of country's top psychologists, but also more importantly, and I don't know if this is true, this is what I have been told by people, I don't know about Mr. Drouillard, but other counsel has said that basically unless you go to this class and admit that you're a monster then they make these recommendations – that you could be taking classes for the next year, your [9] Honor.

THE COURT: Mr. Caccamo, all I want you to do is take the week. As a matter of fact, I will convert it to the weekend class. You just take the class and that's it. You are not labeled a monster because you are taking this class. Don't – I don't know who in the world you are listening to, who is telling you these things, but that is not the way it works. You take the class, take – it's a weekend class, you take care of it, get it behind you, pay your fines and I'll consider terminating you early. Okay?

MR. DROUILLARD: Will he have to take any –

THE COURT: As far as your motion is concerned, I'm denying your motion.

MR. DROUILLARD: Your Honor, will he have to take any further action to effectuate the termination of probation other than –

THE COURT: Let us know what's happened, so we can confirm that all these things are done. That's all.

MR. DROUILLARD: Okay. Thank you.

MS. KURTH: May I say one thing?

THE COURT: No, ma'am. I would rather you didn't, okay. All you're going to do is exasperate this situation.

MR. DROUILLARD: Thank you, your Honor

[10] THE COURT: All right.

(At 2:06 p.m., proceedings concluded)

* * *

[11] STATE OF MICHIGAN)
COUNTY OF WAYNE)

I certify that this transcript, consisting of 11 pages, is a complete, true, and correct transcript of the proceedings and testimony taken in this case on Tuesday, June 19, 2003.

Date: November 7, 2003. /s/ Carla Franceschi
Carla Franceschi, CER-5272
36675 Ford Road
Westland, Michigan 48185

STATE OF MICHIGAN

18TH JUDICIAL DISTRICT (WAYNE COUNTY)

THE PEOPLE OF THE
CITY OF WESTLAND,

V

Case No. 03-900588

TODD STEPHEN CACCAMO

Defendant. /

SENTENCING

BEFORE THE HONORABLE C. CHARLES BOKOS,
DISTRICT JUDGE

Westland, Michigan – Wednesday, June 25, 2003

APPEARANCES:

For the People: ----------

For the Defendant: MR. MARC R. LAKIN P41147
Attorney at Law
645 Griswold, Suite 2110
Detroit, Michigan 48226
(313) 961-1944

RECORDED BY: Carla Franceschi, CER-5272
Certified Electronic Recorder
(734) 595-8720

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WITNESSES: PAGE

None

EXHIBITS:

None

[3] Westland, Michigan

Wednesday, June 25, 2003 – 8:52 a.m.

THE COURT: Todd Caccamo. Caccamo, rather.

MR. LAKIN: Marc Lakin, for Todd Caccamo, your Honor.

THE COURT: Mr. Lakin, how are you, sir?

MR. LAKIN: Good morning.

THE COURT: You're here. for sentencing this morning. You've read the pre-sentence report?

MR. LAKIN: We have.

THE COURT: Any corrections or deletions to the report?

MR. LAKIN: No corrections or deletions. We would just –

THE COURT: Is there anything you want to say? I see the victim's here. Did you want to say something –

MS. KURTH: Yes.

MR. LAKIN: Well, I'd rather have the victim speak first.

MS. KURTH: Yes, sir. I would.

THE COURT: All right. Come on up. You – right up here by that microphone, please. You can stand over there, if you'd like. I read your victim's impact statement, by the way, so –

MS. KURTH: Okay.

[4] THE COURT: – but you're welcome to say whatever you want.

MS. KURTH: Okay. Well, I was just going to read that to the Court.

THE COURT: Fine.

MS. KURTH: Todd is my best friend, the person I confided in – confided my most intimate feelings to, the person I respected the most in this world and the only man I'd ever fallen in love with, but the mental and emotional pain he has put me through is indescribable. I guess the best way to describe our relationship would be the domestic violence power and control wheel.

Verbal attacks. At first he would vent to me, but not at me. As time went on, he would make things more personal by telling me that he hated me, firing me almost daily, and blaming me for things he thought I would do and not things I did. A few hours later or maybe the next day, he would call me back like nothing ever happened and call me to the school when no one was there to have sex.

Intimidation – intimidation. I always felt like I had to walk on pins and needles with him. What if I said the wrong thing? What if I did the wrong thing? I was constantly in fear of losing our relationship, not just sexually, but our friendship ending and me losing a [5] job I loved and a hobby my daughter and I both loved and shared – karate.

Coercion. At times I didn't have the time to sleep with him, but he always talked me into it. If he didn't want it and I pressured him, he would become angry and tell me I couldn't handle the relationship with him and cut me off for sometimes two weeks at a time.

Abusing authority. Todd never wanted to discuss anything when we had a problem. When I pushed him to talk he would yell back at me that he didn't have to discuss anything with me because he was the boss.

Minimizing, denying and blaming. When we had a huge fight at the school one day he blew up at me because the credit card receipts were in the wrong order. When I asked him if he would like the new ones in the front or the back, he became irate and threw the envelope of receipts at me. He called me back later and said that maybe he got a little out of hand.

He would also blame me constantly for allowing the sexual relationship to continue. Todd came on to me probably about eighty percent of the time and whenever he said it had – and whenever he said it had to end, it was my fault it continued because I was in love with him and couldn't handle sleeping with him and not having feelings.

[6] When I was at the karate school with Wayne County Deputy one day having his PPO served, I told him that – that the relationship didn't have to end like this. He told me then that I didn't have to call the police. I said he never should have put his hands on me and his response was I should have listened to him. There was no response or remorse for the harm done.

Then when we came to this Court and tried to work out the civil dispute, he said he didn't do anything against the law. When I pointed out to him exactly what he did, he stormed out of the room. He even asked me that day, "I spent three days in jail, wasn't that enough for you?" This statement alone shows how he is minimizing pointing a gun at me and how close he came to killing me.

Isolation. Todd said for two years that the relationship had to end, even though we discussed moving in together. But when I tried to go out with other people he stopped it. He let me use his password on AOL to use a singles website. When I asked him – and when I told him I was interested in someone he changed the password. The day I told him I had a date with someone is the date he physically abused me.

Economic control. Todd decided I didn't deserve to receive my bonus check in April, 2002, because [7] we had a personal fight, not anything that had to do with the quality of my work at the school. I never knew if I would receive my bonuses or not or the next time I would be fired, even though there was nothing wrong with the quality of my work. He even told me he couldn't run the place without me.

Threats. Todd would not only threaten my job, he would also threaten me physically. On several occasions he threatened to throw me through the wall and on one occasion he put his hands on me, holding my wrists tightly and threatened to throw me through the wall. I pulled my hands away, but about a half hour later is when he threw the envelope at me. One other time he even threw a belt at me.

Todd portrays the epitome of the classic domestic abuser. We would have our tension building, then domestic violence then seduction. But I loved him and I put up with him because I always thought about the good times we had.

Now, to say I don't miss Todd would be a lie. I do immensely, but now since I'm out of the situation, I realize just how much of a victim I was. I still think about him,

but to minimize his sentencing in any way would be a crime in itself. In his mind he won because he did not plead guilty, but maybe the severity of what [8] he did will sink in with enough probation time and counseling and hopefully even a little jail time.

Even after his probation he will be able to just move on while I live in fear for my life every day. I know how vengeful and vindictive he is and the way his mind thinks. Until he gets his revenge on me for putting his reputation on the line for something that is all his fault I will not rest easy. Todd is a sociopathic vigilante and the payback may not be physical. It could be economic, as well, since he stole my credit report and final paperwork on refinance – refinancing my home.

There are only two things in this world Todd cares about, his money and himself. Don't let his charm and two thousand dollar suit fool you. He is an evil, evil man who will stop at nothing to get back at me.

Now, I don't want to say I'm a fortune teller, but I can guarantee you that some time in the future either his wife or some other woman he's sleeping with right now or in the future will be standing before this Court or another for the same reason I am here today – domestic violence. Men who put their hands on women don't just stop doing it. They need serious help.

And at this time I would also like to ask – I know that he was ordered to turn in some of his guns when I had the PPO put against him and I don't know if those [9] were just his registered guns, but I am aware of other weapons that he had in the home and if those weren't turned in I would like to ask that those be turned in, because I do fear for my life, whether from him or someone else.

THE COURT: Have you had any contact with him since this incident?

MS. KURTH: No.

THE COURT: All right. Thank you.

MS. KURTH: I'm sorry. Could I add one more thing?

THE COURT: Sure.

MS. KURTH: He also has several of my personal effects. I would like to ask at this time also that he turn those over to me.

THE COURT: Well, what are those personal effects?

MS. KURTH: Do you want me to hand you the list or –

THE COURT: Well, you can if you want. I don't understand. There's cost of tuition. What do you mean by that?

MS. KURTH: Well, I'm asking – I'm asking for the black belt to be returned.

THE COURT: You mean your belt – a physical belt [10] itself?

MS. KURTH: Yes.

THE COURT: Do you have these things?

THE DEFENDANT: No, sir.

THE COURT: Look at these. Give that to the attorney, will you?

MR. LAKIN: These things were part of the small claims which I'm told that Mr. Caccamo prevailed. There was an appeal that this young lady filed and didn't show up to the appeal.

I'm told – let me just respond to the black belt. This is a – this is a belt that I think it's worth about five or ten dollars, I mean –

THE DEFENDANT: Three bucks.

MR. LAKIN: Three dollars. It's –

THE COURT: Well, give it to her then.

MR. LAKIN: He doesn't have it, but the point is it doesn't have any value. It's just something that can be picked up at any karate store apparently for three dollars. It has no value whatsoever. That's just item one.

It says six hundred and twenty-five dollars. I –

THE COURT: Well, I'm not – look, the – the – as far as I'm concerned, the smalls claims case –

[11] MR. LAKIN: He has nothing of hers.

THE COURT: I don't know what happened that caused you not to show up, but you weren't here for the case and the case got dismissed.

MS. KURTH: I just had surgery, your Honor.

THE COURT: Now, you have an – well, you should have told somebody. We didn't know that. You know, if you had called ahead of time and let us know that, we probably would have adjourned the case for you, but when no one showed up, that case went by the wayside.

Now, you have an attorney. He knows what to do to get these items back. You'll have to – we're not going to get involved in – in – in what's with him and what's not with him. That's not really what we're here for.

All right. Anything you want to say before I sentence?

MR. LAKIN: The only thing I want to say to this – for Mr. Caccamo who I know has just been biting his tongue and he will continue to do that so I don't think he's going to want to say anything but since I've known Mr. Caccamo I can tell you this, Mr. Caccamo is not only not a threat to this young lady, but he would like to never see her ever at any place or any time.

This young lady says in the pre-sentence report that she lives in fear every day of – that he's going to [12] do something or – or that he's done something. It may be the first sentence of her victim impact statement indicates – could we read that first line, what she says?

THE COURT: Well –

MR. LAKIN: It's just very –

THE COURT: – you mean the statement that she made today?

MR. LAKIN: No. The statement that she – she said in the pre-sentence report, the first sentence of the – of her statement.

THE COURT: The victim did provide a victim's impact statement. The victim indicates there is a retaliation from the Defendant every day. Is that what you mean?

MR. LAKIN: Every day. And your Honor asked the appropriate question, what contact has he made in the

several months this case has been going on. There's been no contact whatsoever.

The – the – the victim has to move on. Mr. Caccamo is a married man now. He had been planning his wedding and, in fact, in the midst of planning this wedding, even though whatever relationship existed between the victim and – and – and Mr. Caccamo was – did not spill over to the – to the fact that he was going to fire her. I mean, she was allowed to keep her job. This lady [13] is obviously – has admitted she's very infatuated with Mr. Caccamo, but Mr. Caccamo is now a married man. He is, to me, been a gentleman through this – through this whole procedure. He, frankly, had a very good case. I have the whole incident on a – on a – on a tape recording – the entire incident that we're here for.

I think it bodes well for Mr. Caccamo that he – he has more or less bit the bullet on this case, but Miss – the victim in this case, even on the tape when she calls the police, refers to Mr. Caccamo, as he's just about to get married to someone else, as her boyfriend. And I just want to let you know that – that – that there was not at that time a boyfriend-girlfriend situation. It was not a domestic violence.

Any argument they had, any dispute they had was purely work related at that point in time and I think that the victim is minimizing her involvement. If I was to play the tape in open court I think it would be an embarrassment, not to Mr. Cacc – I wouldn't do that, because I don't want to embarrass the victim, but I think it would be embarrassing to – to the – to the victim in this case.

And so Mr. Caccamo is – is, I think, done the right thing throughout this whole proceeding. He's – he's taken

some responsibility here, but he's moving on, your [14] Honor. He has moved on a long, long time ago and I wish the victim would do the same.

THE COURT: Okay. Anything you want to add, sir?

THE DEFENDANT: I'm sorry, sir?

THE COURT: Anything you want to add?

THE DEFENDANT: No, sir.

THE COURT: Well, you know, Judges get put in a difficult position in these kinds of cases, because first of all our court has a real strong attitude about domestic violence. We don't tolerate it and we look at it very seriously and our biggest concern naturally is to make sure that the victim is protected forever. I don't tolerate domestic violence. I – I don't think there's any room for it.

I just feel in trying to analyze what went on here between the two of you is – I got a feeling, Mr. Caccamo, that you used this victim. I think she's been used. I really do. I think she was – she was the convenient sex partner at work while you were going on with another relationship and I think that ultimately your original relationship, which has obviously resulted in your marriage and that's your business and there's nothing wrong with that, but in the meantime I think this victim got left in a lurch. That's – that's the way I [15] view it and I think it was, you know, and – and I may be wrong, but I'm just telling you how I – how I see this thing. And I think she has been used.

But by the same token, I have to agree with Mr. Lakin. It's time for you to move on. You got to get this man out of your life, out of your thoughts. You know, you say

you think about him every day. You got to stop thinking about him every day. He's got another relationship. He's married. He's no longer in your life. You know, you are a smart young lady and I know that you will succeed in whatever you want to do. You don't need him any more. And you shouldn't want him anymore after what's happened between you.

But I can't cure, you know, I can't make what happened any better for you, I mean, it's something that you have to work out yourself. And he's been through a lot, too, having of course been subjected to being in court and hiring lawyers and, you know, in a – in a marriage. He's gotten married now with this thing hanging over his head. I'm sure there's been a lot of pressure and stress on him, too.

But I do have a tremendous amount of sympathy for what's happened to you. I really do, because I think you were used. That's my feeling. But it's over. It's absolutely over and you've got to leave him alone and he [16] had better leave you alone, because if he doesn't, then he's going to jail.

Now, Mr. Caccamo has pled guilty as a first offender and I'm going to treat him as such. I'm going to follow the recommendation of the probation department. I'm going to place him on a year's non-reporting probation. I want him to attend the domestic violence weekend program and follow any recommendations that that program requires of him. You stay away from 4185 Cadillac. That is your home in Wayne?

MS. KURTH: Yes, sir.

THE COURT: You're to have absolutely no contact with Colleen Kurth, and no contact means – Mr. Caccamo, are you listening to me?

THE DEFENDANT: Yes, sir.

THE COURT: No contact means no phone calls, no letters, no e-mails. Neither you or anyone on your behalf is to have any contact with this lady. And by the same token, I tell you not to have any contact. Your lawyer will tell you the same thing. Leave each other alone. Go on with your lives. It's over. Bad experience is over. Bad experience is over.

Fines and costs of $300, $10 judgment fee, $240 in probation costs. You do everything I tell you to do and the agreement was that this would stay off your [17] record. Keep in mind any violation of probation and my policy is it goes on your record and you go to jail. Any questions?

MR. LAKIN: Thank you very much, your Honor.

THE COURT: All right.

(At 9:07 a.m., proceedings concluded)

* * *

[18] STATE OF MICHIGAN)
COUNTY OF WAYNE)

I certify that this transcript, consisting of 18 pages, is a complete, true, and correct transcript of the proceedings and testimony taken in this case on Wednesday, June 25, 2003.

Date: July 25, 2003. /s/ Carla Franceschi
Carla Franceschi, CER-5272
36675 Ford Road
Westland, Michigan 48185

STATE OF MICHIGAN

18TH JUDICIAL DISTRICT (WAYNE COUNTY)

THE PEOPLE OF THE
CITY OF WESTLAND,

V

Case No. 03-900588

TODD STEPHEN CACCAMO

Defendant. /

PLEA

BEFORE THE HONORABLE C. CHARLES BOKOS,
DISTRICT JUDGE

Westland, Michigan – Friday, May 9, 2003

APPEARANCES:

For the People: - - - - - - - - - -

For the Defendant: MR. MARC R. LAKIN P41147
Attorney at Law
645 Griswold, Suite 2110
Detroit, Michigan 48226
(313) 961-1944

RECORDED BY: Carla Franceschi, CER-5272
Certified Electronic Recorder
(734) 595-8720

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WITNESSES: PAGE

None

EXHIBITS:

None

[3] Westland, Michigan

Friday, May 9, 2003 – 10:04 a.m.

THE COURT: I understand you're entering a plea on this case today?

MR. LAKIN: Yeah, yeah.

THE COURT: Okay.

MR. LAKIN: There should be a plea form somewhere around here.

THE COURT: We're getting – getting the file right now.

MR. LAKIN: Okay. You got a jury trial going, is that what's going on?

THE COURT: No, no, that's – those are Monday. All right. This is the case of Todd Caccamo.

MR. LAKIN: Is there a plea form in the file that we have to sign?

THE COURT: There is.

MR. LAKIN: If I could just go over it with him.

THE COURT: Okay. Well, you want to take some time with him?

MR. LAKIN: No. We already know what it is.

THE COURT: All right. Miss – Miss Kurth, have you talked to anybody about this case? Do you know what's going on here today?

[4] MS. KURTH: Somewhat. I have not spoke with my attorney. I spoke with one attorney, then I got a

phone call from the Court and found out I had a different attorney.

THE COURT RECORDER: She spoke with Mark McConnell.

THE COURT: Oh, no, Mark McConnell is the City – that's the City Attorney, Miss Kurth. That's not your attorney.

THE COURT RECORDER: Apparently – apparently, Mr. Kennedy was here the last time they were in court.

THE COURT: Yeah, those are the City Attorneys. They're the Prosecuting Attorneys.

MS. KURTH: Right. I spoke with Mr. Kennedy. I guess I have Mr. McConnell now. I've never met him. I spoke with him briefly on the phone.

THE COURT: Okay. Come on up here a second so I can fill you in on what's going on and see whether you're aware of what's happening here. What don't – you can just set at the other table if you want.

Mr. Caccamo is going to plead no contest to a charge of domestic violence and it will be taken under advisement as long as he completes his sentence satisfactorily. Any objection to that?

MS. KURTH: No.

[5] THE COURT: Okay. Now, that is the plea agreement, Mr. Lakin, is that correct?

MR. LAKIN: That is.

THE COURT: Mr. Caccamo, my understanding is you're going to plead no contest –

MR. LAKIN: Do you want us to go to the podium?

THE COURT: You can sit right there, if you want.

MR. LAKIN: Okay, thank you.

THE COURT: Plead no contest to a charge of domestic violence and as long as you do everything I tell you to do and complete my sentence satisfactorily, you'll have an opportunity to keep this offense off your record, understood?

THE DEFENDANT: Yes, sir.

THE COURT: Now, what I'm going to do in this case, so you'll know, Miss Kurth, I'm going to refer this to our probation department for a pre-sentence report after the plea is taken and they will send you a victim's impact statement and I want you to fill that out and send it back to us. The victim's impact statement tells me your version of what happened, any recommendations that you think I should consider in rendering a sentence or anything else that you want to bring to my attention, okay?

[6] MS. KURTH: I just have a question, your Honor.

THE COURT: Sure.

MS. KURTH: Even if he does fulfill all the probation and everything, the charge will still show up on a CCH, correct?

THE COURT: Well, as – if he doesn't complete his sentence satisfactorily, it will.

MS. KURTH: No, but even if he does complete it satisfactorily, it would still show up on a CCH?

THE COURT: Well, you know what they – what happens is the arrest goes in, that's true, but when the under advisement occurs after the completion of the sentence, then that's cleansed. That goes off his record. It won't go on his permanent record, no.

All right. No contest plea means you neither admit or deny guilt, but that I determine your guilt by looking at the police report. If I'm satisfied there's a basis for these charges, I can accept your no contest plea and treat it just as if you plead guilty. Any questions about that?

THE DEFENDANT: No, sir.

THE COURT: The offense carries a penalty of up to ninety days in jail and a fine of up to five hundred dollars – ninety-three days in jail and a fine of up to five hundred dollars. Those are the maximum penalties [7] the Court can impose.

By pleading no contest, you give up the right to have a trial. You give up the right to have that trial before a judge or a jury. You give up the right to be presumed innocent throughout the trial, until your guilt's established beyond a reasonable doubt by the Prosecutor. You give up the right to remain silent and not testify during the trial, without it used against you. You give up the right to have witnesses brought in to assist your defense and you give up the right to cross-examine and confront anybody who might be a witness against you. Those rights are the ones that you

give up by pleading no contest. And I'm sure you and Mr. Lakin went over those rights, is that correct?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions at all about the rights you're giving up?

THE DEFENDANT: No, sir.

MR. LAKIN: I – I have a question, your Honor.

THE COURT: Certainly.

MR. LAKIN: It's – it's my understanding through Mr. McConnell and I – we've had lengthy, lengthy discussions about this. When your Honor calls this a sentencing, that you're not going to accept his plea and – and as such, you're going to take the matter under [8] advisement for a certain period of time. And as such, I don't think it would be called a sentencing, and as such, I don't think that he – a victim's impact statement is – is absolutely –

THE COURT: That is not – that's not our procedure at all.

MR. LAKIN: I understand, but –

THE COURT: It is a sentencing. He will be sentenced on these charges. When he comes back he probably, because it's an under advisement plea, of course, there's no likelihood of me putting him in jail, but he'll be placed on probation for a period of time. If the probation department makes recommendations as to some kind of therapeutic program they think is necessary, they'll make that recommendation and I'll impose it.

And at the completion of his term, after his fines are paid and he's done whatever I ask him to do, then the offense is dismissed. We give you an order of dismissal. You can send it to the State Police and get this thing cleansed.

MR. LAKIN: All right. Thank you.

THE COURT: That's how it works.

MR. LAKIN: All right. Thank you.

THE COURT: All right. Put the victim's impact statement is a – is a principal part of this, you know, [9] all domestic violence cases. We want to know what the victim has to say. It's important for us to know that.

All right. You have – you're not on probation or parole currently?

THE DEFENDANT: No, sir.

THE COURT: All right. Any objection then if I read the police report for a factual basis?

MR. LAKIN: No, no objection.

THE COURT: All right. I'm going to read the incident report 03-4236 for a factual basis. All right. I'm satisfied there is a factual basis for these charges. I will accept the no contest plea. I assume the no contest is because of civil – potential liability, is that correct?

MR. LAKIN: That is correct.

THE COURT: All right. All right, you'll be back here for sentencing on – Carla?

THE COURT RECORDER: Any day the week of June 23rd.

THE COURT: Any day you want that week.

MR. LAKIN: How about Wednesday, the 25th.

THE COURT RECORDER: Eight-thirty okay?

MR. LAKIN: That's – that's perfect.

THE COURT: All right. Wednesday, the 25th of June will be the sentencing date at eight-thirty. Take [10] you over to probation. They'll talk to you and I'll see you back here on that date.

MR. LAKIN: Thank you very much.

THE COURT: Miss Kurth, you'll get the victim's impact statement in the mail. If you choose to, fill it out and send it back to us.

MS. KURTH: Okay.

THE COURT: Okay, thank you.

(At 10:10 a.m., proceedings concluded)

* * *

[11] STATE OF MICHIGAN)
COUNTY OF WAYNE)

I certify that this transcript, consisting of 11 pages, is a complete, true, and correct transcript of the proceedings and testimony taken in this case on Friday, May 9, 2003.

Date: July 25, 2003. /s/ Carla Franceschi
Carla Franceschi, CER-5272
36675 Ford Road
Westland, Michigan 48185

Order

Michigan Supreme Court
Lansing, Michigan

January 30, 2006

Clifford W. Taylor,
Chief Justice

128833(56)

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE CITY OF WESTLAND,
Plaintiff-Appellee,

SC: 128833
COA: 255336
Wayne CC: 03-500089-FM

v

TODD STEPHEN CACCAMO,
Defendant-Appellant. /

On order of the Court, the motion for reconsideration of this Court's order of October 31, 2005 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

[SEAL] I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 30, 2006 /s/ Corbin R. Davis
Clerk

Court of Appeals State of Michigan

ORDER

People of the City of Westland v Todd Stephen Caccamo	Kirsten Frank Kelly Presiding Judge
Docket No. 255336	Henry William Saad
LC No. 03-500089-FM	Michael R. Smolenski Judges

The Court orders that the motion for reconsideration is DENIED.

[SEAL] A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

April 11, 2005 /s/ Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

THIRD CIRCUIT COURT CRIMINAL DIVISION

COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN — **Case No. 03-500089**
Hon. Vera Massey Jones

Plaintiff.

Todd Caccamo
Defendant. /

ORDER

At a session of said Court held in the Frank Murphy Hall of Justice-Criminal Division of the City of Detroit, State of Michigan, County of Wayne on: *April 8, 2004*

PRESENT: Honorable Vera Massey Jones

A Motion for reconsideration having been filed; and the court having reviewed the records in the cause and being fully advised in the premises.

IT IS HEREBY ORDERED THAT the Motion for reconsideration be and is hereby DENIED. No new issues are raised.

April 8, 2004

/s/ Vera Massey Jones
Hon. Vera Massey Jones
Judge Criminal Division

Court of Appeals, State of Michigan

ORDER

People of the City of Westland v Todd Stephen Caccamo	Peter D. O'Connell Presiding Judge
Docket No. 255336	William C. Whitbeck
LC No. 03-500089-FM	Donald S. Owens Judges

The Court orders that the motion to file late answer is GRANTED.

The Court orders that the application for leave to appeal is GRANTED, limited to the issues raised in the application. MCR 7.205(D)(4). The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(D)(3).

On the Court's own motion pursuant to MCR 7.205(D)(2) and 7.209(A)(1), the Court orders that further proceedings are STAYED pending resolution of this appeal or further order of this Court.

Presiding Judge

Judge O'Connell would PEREMPTORILY REVERSE.

/s/ [Illegible]

[SEAL] A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

Aug. 23 2004	/s/ Sandra Schultz Mengel
Date	Chief Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: SEALED CASE.	CRIM. CASE NO.: SEALED
	HONORABLE PAUL V. GADOLA U.S. DISTRICT JUDGE

OPINION AND ORDER DENYING DEFENDANTS RELEASE ON BOND

I. BACKGROUND

Before the Court is a stipulation for Defendant's release on bond pending sentencing in this criminal case. The intended purpose of this release is to afford Defendant the opportunity to cooperate with the Government. The Court will deny release on bond because (1) Defendant's detention in this situation is mandatory, pursuant to 18 U.S.C. § 3143(a)(2), and (2) the Court lacks jurisdiction to determine whether any exceptional reasons, under 18 U.S.C. § 3145(c), merit the release of Defendant.

II. ANALYSIS

A. 18 U.S.C. § 3143(a)(2) Controls

Defendant's detention pending sentencing is governed by the mandatory detention provisions of § 3143(a)(2). This section states:

> The judicial officer *shall* order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of [18 U.S.C. § 3142(f)(1)] and is awaiting imposition or execution of sentence *be detained unless*

> (A) (i) the judicial officer finds there is a substantial likelihood that a motion for *acquittal* or *new trial* will be granted; or
>
> (ii) an attorney for the Government has recommended *that no sentence of imprisonment* be imposed on the person; and
>
> (B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

18 U.S.C. § 3143(a)(2) (emphasis added). Mandatory detention under § 3143(a)(2) is required whether a defendant was detained or released pending trial.

In this case, § 3143(a)(2) controls because Defendant has been found guilty of an offense itemized in 18 U.S.C. § 3142(f)(1)(A)-(C). Section 3142(f)(1)(B) covers offenses "for which the maximum sentence is life imprisonment or death." Section 3142(f)(1)(C) describes, *inter alia,* offenses "for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 *et seq.*)." Here, Defendant was found guilty of (i.e., pleaded guilty to) three counts of the Indictment, including Count One: conspiracy to distribute marijuana, 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. These statutory provisions are a part of the Controlled Substances Act, and, as stated in the Presentence Investigation Report, Count One carries a statutory minimum incarceration period of ten years and a maximum of life. Therefore, Defendant was found guilty of "an offense for which the maximum sentence is life imprisonment," § 3142(f)(1)(B), and Defendant was found guilty of "an offense for which a maximum term of imprisonment of ten

years or more is prescribed in the Controlled Substances Act," § 3142(f)(1)(C). Consequently, § 3143(a)(2) controls this detention determination.

B. 18 U.S.C. § 3143(a)(2) Requires Detention

Section 3143(a)(2) does not give the Court discretion to release a defendant unless one of the two exceptions of § 3143(a)(2)(A) are met. Then, if one of those two exceptions is satisfied, the additional exception of § 3143(a)(2)(B) must also be met.

In this case, the two exceptions of § 3143(a)(2)(A) are not satisfied. First, there is not "a substantial likelihood that a motion for acquittal or new trial will be granted" due to Defendant's guilty plea. 18 U.S.C. § 3143(a)(2)(A)(i). Second, the Government has failed and refused to recommend "that no sentence of imprisonment be imposed" on Defendant. 18 U.S.C. § 3143(a)(2)(A)(ii).

Since neither of the exceptions in § 3143(a)(2)(A) are satisfied, the Court need not even consider the exception in § 3143(a)(2)(B). Furthermore, since the two exceptions of § 3143(a)(2)(A) are inapplicable in this case, the Court must detain Defendant under the explicit terms of § 3143(a)(2) ("The judicial officer *shall* order that a person . . . *be detained.* (emphasis added)).

C. This Court Lacks Jurisdiction to Apply the "Exceptional Reasons" Exception of 18 U.S.C. § 3145(c)

Since § 3143(a)(2) precludes the parties' requested relief, the parties seek to appeal the Defendant's mandatory

detention under the "exceptional reasons" exception of 18 U.S.C. § 3145(c).[1] Section 3145(c) states:

> An *appeal* from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of [28 U.S.C. § 1291[2]] and [18 U.S.C. § 3731.[3]] The *appeal* shall be determined promptly. A person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are *exceptional reasons* why such person's detention would not be appropriate.

18 U.S.C. § 3145(c) (emphasis added).

The parties contend that this Court has the jurisdiction to act under § 3145(c). Nonetheless, "federal courts have an independent obligation to investigate and police the boundaries of their own jurisdiction." *Douglas v. E.G. Baldwin & Assocs., Inc.*, 150 F. 3d 604, 607 (6th Cir. 1998). In fulfilling this obligation, the Court has determined that, contrary to the parties' contention, this Court

---

[1] Note that 18 U.S.C. § 3145(b), which allows this Court to review detention orders imposed by a magistrate judge, does not apply in this case because the magistrate judge's detention order only concerned detention pending trial; since Defendant has already pleaded guilty and is awaiting sentencing, the magistrate judge's detention order no longer has effect. Alternatively, even if § 3145(b) was somehow applicable to this situation, the Court would still be bound by § 3143(a)(2), which, as discussed *supra*, requires mandatory detention in this situation.

[2] 28 U.S.C. § 1291 (courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts).

[3] 18 U.S.C. § 3731 (appeal of criminal case by the United States shall lie to a court of appeals).

lacks jurisdiction to issue § 3145(c) relief; Congress has mandated that the United States Courts of Appeals are the only courts with the jurisdiction to override a § 3143(a)(2) mandatory detention and order the release of a defendant because of exceptional reasons, pursuant to § 3145(c). *See United States v. Salome,* 870 F. Supp. 648, 652-53 (W. D. Pa. 1994), *aff'd without opinion,* 96 F. 3d 1436 (3d Cir. 1996); *United States v. Nesser,* 937 F. Supp. 507, 508-09 (W.D. Pa. 1996); *United States v. Young,* No. 01-50035, Docket Entry 200, at 3-5 (E.D. Mich. Nov. 19, 2002) (Gadola, J.).

There is no binding precedent on this Court on this jurisdictional issue, and the Court finds the following statutory interpretation and holding of *Salome* to be highly persuasive:

> *[T]he court finds that the jurisdiction established by § 3145(c) is appellate jurisdiction, not original jurisdiction to act independently. Accordingly, as this court issued the defendant's detention order in the first instance, we have no authority, pursuant to § 3145(c) to determine whether there are "exceptional reasons" that make defendant's detention inappropriate in this case.*
>
> The court makes this ruling notwithstanding our careful consideration of the many circuit court decisions to the contrary.[4] . . . As noted by Judge Billings in *United States v. Bloomer,* 791 F. Supp. 100, 102 n.1 (D. Vt. 1992), *these circuit court decisions "however well-intentioned reflect a certain circularity of reasoning." We agree. Furthermore*

---

[4] *See infra.*

these decisions ignore certain fundamental principles of statutory interpretation.

First, the plain language of § 3145(c) compels the conclusion that it is applicable only on appeal. The provision is entitled "Appeal from a release or detention order." The first sentence of the subsection provides: "An appeal from a release or detention order, . . . is governed by the provisions of [28 U.S.C. § 1291]." [Section] 1291 authorizes appeals only from final decisions of the district courts. In light of this language, it is illogical to postulate that a district court should apply § 3145(c) when initially ruling on a release or detention motion.

Second, the overall structure of § 3145 belies the argument that § 3145(c) should be applied by a district court. Sections 3145(a) and 3145(b) provide for review of the conditions of a release order, or of a detention order, if the order is entered by a magistrate or "a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court." 18 U.S.C. §§ 3145(a) and (b). Review is provided in the court having original jurisdiction over the offense. Because § 3145(c) provides that appeal from a release or detention order is governed by § 1291, which authorizes appeals only from final decisions of the district courts, an order entered by someone other than the district court judge must be reviewed by the district judge before appeal can be taken to the court of appeals. If release or detention is ordered initially by the district court, as in this case, § 3145(c) provides for direct appeal to the courts of appeals. Wright, Miller & Cooper, *Federal Practice and Procedure* § 3918.2 at 439-40 (2d ed. 1991).

Third, there is little support for the argument that the "exceptional reasons" provision of § 3145(c) should be read in conjunction with those provisions of § 3143 that outline the general procedures by which a judicial officer determines whether a defendant should be detained or released pending sentence or appeal. If the Congress had intended to invest district courts with the discretion to determine whether "exceptional reasons" existed, this court believes it would have said so in § 3143. The fact that Congress inserted the "exceptional reasons" language in § 3145(c) indicates that they intended this discretion to be limited to the judges of the courts of appeals.

Finally, some courts have suggested that § 3145(c) is applicable to the district courts simply because the federal appellate courts are not positioned to make factual findings which may [be] required to determine whether "exceptional reasons" exist. We reject this argument. We find support for this position in *United States v. Provenzano,* 605 F.2d 85 (3d Cir. 1979). In *Provenzano,* the Third Circuit held that a court of appeals has a nondelegable responsibility to make an independent determination of the merits of a bail application pending the appeal of a conviction. The court grounded its ruling upon Fed. R. App. P. 9(b), which states that motions for release or modification of the conditions of bail "shall be determined promptly on such papers, affidavits, and portions of the record as the parties shall present. . . . " In its ruling, the court noted that since Rule 9(b) "permits consideration by the court of appeals of evidence that may not have been before the trial judge," independent review by the court of appeals must have been

> contemplated by Congress. *Provenzano,* 605 F.2d at 93. In view of *Provenzano* and the mandate of Fed. R. App. P. 9(b), the courts of appeals have the ability, indeed the responsibility, to make independent findings in proceedings arising under the Bail Reform Act. These authorities clearly negate the inference that § 3145(c) should be applied by the district courts in the first instance because of some perceived inability of the circuit courts to make factual findings.
>
> *In light of the plain language of § 3145c, the overall structure of § 3145 and the procedures set forth in Fed. R. App. P. 9(b), this court finds that § 3145(c) does not apply to a district court when it rules on a release or detention motion in the first instance.*

Salome, 870 F. Supp. at 652-53 (footnotes omitted).

Recent amendments to Rule 9 of the Federal Rules of Appellate Procedure provide even greater support for *Salome's* fourth argument, which counters the contention, advanced by others and by the parties in this case, that § 3145(c) should be applicable to the district courts simply because the federal appellate courts are not equipped to make exceptional reasons determinations.

The new Rule 9(a) governs an appeal of an order regarding the release or detention of a criminal defendant before judgment of conviction (i.e., before sentencing, *see* Fed. R. Crim. P. 32(d)(1)). Rule 9(a)(1)-(2) states:

> (1) The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case. A party appealing from the order must file with the court of appeals a copy of the

> district court's order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the *factual basis* for the district court's order must file a transcript of the release proceedings or an explanation of why a transcript was not obtained.
>
> (2) After reasonable notice to the appellee, the court of appeals must promptly *determine the appeal on the basis of the papers, affidavits, and parts of the record that the parties present or the court requires.* Unless the court so orders, briefs need not be filed.

Fed. R. App. P. 9(a)(1)-(2) (emphasis added).

These instructions strongly indicate that Rule 9(a) contemplates the federal appellate courts making exceptional reasons determinations under § 3145(c). This conclusion is supported by Rule 9(c), which explicitly directs the appellate courts to look to § 3145(c) in making decisions regarding release. *See* Fed. R. App. P. 9(c). This conclusion is also supported by the advisory committee notes regarding the recent amendments to Rule 9. These notes state that the "broad" language presently in Rule 9(a) was specifically added because the appellate courts now hear appeals pursuant to § 3145(c). *See* Fed. R. App. P. 9(a) advisory committee's note (1994 amendments). Thus, the contention that § 3145(c) should be applicable to the district courts simply because the federal appellate courts are not equipped to make an exceptional reasons determination is incorrect. Under Rule 9, the United States Courts of Appeals are more than sufficiently

prepared to make exceptional reasons determinations pursuant to § 3145(c).[5]

Additionally, *Nesser,* which followed *Salome,* bolstered *Salome's* persuasive statutory interpretation by adding the following analysis:

> [B]oth sections 3145(a) and (b) contain references to judicial decisionmakers "other than a Federal appellate court." Section 3145(c) omits this language. The natural and justifiable conclusion to draw from this structure is that the "other than a Federal appellate court" language is left out of section 3145(c) because Congress was addressing federal appellate courts in that section, and so did not need to separately distinguish them.

Nesser, 937 F. Supp. at 509.

In summary, the Court finds *Salome's* statutory interpretation of § 3145(c), as amplified by *Nesser* and the new version of Rule 9, to be highly persuasive and correct, and the Court holds that it lacks jurisdiction to issue relief under § 3145(c). *See* 870 F. Supp. at 652-53; 937 F. Supp. at 508-09; Fed. R. App. P. 9.

The Court so holds knowing that the weight of authority is to the contrary. Currently, five federal circuit courts have held in published opinions, that federal district courts do have jurisdiction to issue § 3145(c) relief. These five circuit opinions, however are easily distinguished.

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[5] *See also United States v. Salerno,* 481 U.S. 739, 752 (1987) ("The [Bail Reform] Act's review provisions, § 3145(c), provide for immediate appellate review of the detention decision.").

In *United States v. Carr,* the Fifth Circuit reasoned that, because § 3145(c) refers to §§ 3143(a)(2) and (b)(2) and because 3143 uses the term "judicial officer" to refer to the individuals who initially order mandatory detentions, § 3145(c)'s use of the term "judicial officer" must also refer to individuals initially ordering such mandatory detentions, i.e., individuals at the district court level. *See* 947 F.2d 1239, 1240 (5th Cir. 1991). The Fifth Circuit's conclusion is incorrect. The purpose of § 3145(c)'s reference to § 3143 is not to define who the appropriate judicial officer should be; Congress addressed that issue in § 3145(c)'s clear introductory sentence stating that the appellate provisions of 28 U.S.C. § 1291 and 18 U.S.C. § 3731 govern § 3145(c) determinations. Rather, the purpose of the reference to § 3143 is to define which detainees are eligible for § 3145(c) relief and to set forth the standard for issuing § 3145(c) relief.

Similarly, in *United States v. Herrera-Soto,* the Seventh Circuit held that § 3145(c)'s term "'judicial officer' encompasses both lower courts and courts of appeal." 961 F.2d 645, 647 (7th Cir. 1992). This conclusion, like the Fifth Circuit's conclusion, fails to account for the clear instructions from Congress in § 3145(c)'s introductory sentence that the appellate provisions of 28 U.S.C. § 1291 and 18 U.S.C. § 3731 govern § 3145(c) determinations. Furthermore, as to the other three published circuit opinions on the matter, none included an independent statutory analysis. *See United States v. DiSomma,* 951 F.2d 494, 496 (2d Cir. 1991) (following *Carry*; *United States v. ,zones,* 979 F.2d 804, 806 (10th Cir. 1992) (following *Carr, Herrera-Soto DiSomma*); *United States v. Mostrom,* 11 F.3d 93, 95 (8th

Cir. 1993) (following *Carry*. Therefore, the Court finds the so-called weight[6] of these circuit opinions much lighter than a momentary glance at a string cite to all five would otherwise suggest.

As for the Sixth Circuit, there is a recent opinion, *United States v. Cook,* holding that federal district courts do have jurisdiction to issue § 3145(c) relief. No. 02-5775, 2002 WL 1869446, at *1-2 (6th Cir. Aug. 13, 2002). Nonetheless, *Cook* is unpublished, and "[i]t is well-established law in this circuit that unpublished cases are not binding precedent." *Bell v. Johnson,* 308 F.3d 594, 611 (6th Cir. 2002) (citing *Salamalekis v. Comm'r of Soc. Sec.,* 221 F. 3d 828, 833 (6th Cir. 2000); *Cattin v. Gen. Motors Corp.,* 955 F.2d 416, 431 n.14 (6th Cir. 1992)). *Cook* followed the five published circuit opinions on this issue and, like the Seventh Circuit, found § 3145(c)'s term "judicial officer" to include federal district court officers. 2002 WL 1869446, at *1-2. Again, with due respect, this conclusion runs against the clear instructions from Congress in § 3145(c)'s opening sentence that the appellate provisions of 28 U.S.C. § 1291 and 18 U.S.C. § 3731 govern § 3145(c) determinations.

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[6] Given the weakness of these five circuit opinions, the Court is boggled by the inconsistent treatment of this issue in *United States v. Burnett,* in which another district court within the Sixth Circuit found *Salome* and *Nesser* to be "logical and persuasive" but opted not to follow *Salome* and *Nesser* because of the "great weight" of published circuit opinions from outside of the Sixth Circuit. 76 F. Supp. 2d 846, 847-49 (E.D. Tenn. 1999). *See also United States v. Devinna,* 5 F. Supp. 2d 872, 873 (E.D. Cal. 1999) (finding *Salome* and *Nesser* to be "persuasively reasoned" but following the "overwhelming weight" of the five circuit opinions); *United States v. Cantrell,* 888 F. Supp. 1055, 1057 (D. Nev. 1995) (finding *Salome* "quite persuasive" but following the "weight of authority"). Cf. *United States v. Rodriguez,* 50 F. Supp. 2d 717, 719 (N.D. Ohio 1999) (ignoring *Salome* and *Nesser* and simply following the crowd).

Therefore, as with the other circuit opinions, the Court respectfully finds the non-binding *Cook* opinion to be unpersuasive.[7]

Lastly, the Court turns the parties' policy arguments. The parties argue that forcing them to appeal the detention to the Sixth Circuit will consume too much time and will reduce the benefits of Defendant's proposed cooperation. The Court is not unsympathetic to this concern. The Court understands the importance of the proposed cooperation, and, given the parties stipulation, the Court is willing to accept that exceptional circumstances are present here. However, such policy concerns do not justify overriding the clear jurisdictional instructions of Congress. Moreover, Rule 9(a)(3) provides a mechanism to help alleviate the concern about time delays on appeal. Rule 9(a)(3) states: "The court of appeals or *one of its Judges may order the defendant's release pending the disposition of the appeal.*" Fed. R. App. P. 9(a)(3) (emphasis added). Therefore, while the parties are waiting for a panel of the Sixth Circuit to make an exceptional reasons determination under § 3145(c), the parties could secure Defendant's release from a single circuit judge. Such relief under Rule 9(a)(3) will undoubtably mitigate the adverse effects of the delay on appeal.

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[7] The Court notes that *Cook* stated that "[a]lthough the mention of exceptional circumstances appears at the close of a section otherwise devoted to review and appeal, *we are not convinced* that it is meant to be an instruction limited to the courts of appeals." 2002 WL 1869446, at *1. The Court urges the Sixth Circuit to reconsider its holding in *Cook* before issuing a published opinion on this § 3145(c) issue; the Court hopes that a close review of § 3145(c), Rule 9, *Salome, Nesser,* and this Opinion will convince the Sixth Circuit that Congress did limit § 3145(c) determinations to the courts of appeals.

The Government further argues that denying § 3145(c) relief at the district court level will irreparably disrupt the guilty plea process. That is, by requiring parties to seek § 3145(c) relief at the appellate court level, the Court is creating an incentive for the Government to avoid securing guilty pleas from defendants who could assist the Government with prospective cooperation. The Government further argues that it is generally better to have detained defendants plead guilty before release because it ensures a conviction, reduces the defendant's incentive to flee, and increases the defendant's incentive to cooperate. Again, the Court is not unsympathetic to this policy concern. Nevertheless, such a concern does not justify ignoring a congressional mandate to limit exceptional reasons relief to the federal appellate courts. Furthermore, a partial solution to this predicament is for the Government, when it knows that it may want to seek a defendant's release, to still secure the guilty plea but move for the Court to take the plea under advisement. While the plea is under advisement, the defendant is still presumed innocent; and therefore, the mandatory detention provisions of § 3143(a)(2) would be inapplicable because the defendant would not be "found guilty" at that pertinent point in time. It follows that, since § 3143(a)(2) would be inapplicable, the § 3145(c) jurisdictional concern would not become an issue.

The parties' final policy argument is that, because this matter is before the Court upon a stipulation of the parties, and not merely a defendant's motion, the parties' mutual agreement should not be frustrated.[8] In support of

[8] The Government makes a related argument that the words "upon motion of the attorney for the Government" within § 3142(f)(1) (which

(Continued on following page)

this argument, the parties note that in *Salome* and *Nesser*, unlike the situation here, the Government opposed release. *See* 870 F. Supp. at 650; 937 F. Supp. at 507. Be that as it may, the Court cannot disregard the clear instructions of Congress: § 3143(a)(2) mandates Defendant's detention, and § 3145(c) precludes the Court from issuing exceptional reasons relief. Nowhere in § 3143(a)(2) is there an exception for situations in which the Government stipulates to a defendant's release. Amending § 3143(a)(2) to include such an exception may be in order, as may an amendment to § 3145(c) to include district court jurisdiction. However, this Court is not the legislature. This Court lacks the authority to amend the United States Code. As Justice Scalia has stated: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (Scalia, J., for a unanimous Court) (citing *Willy v. Coastal Corp.*, 503 U.S. 131, 136-37 (1992); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *Am. Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951)).

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provides § 3143(a)(2)'s offense definitions) some how carves out an special exception for cases in which the Government seeks a defendant's release in the § 3143(a)(2) context. The Court disagrees. Section 3143(a)(2) cites to § 3142(f)(1)(A)-(C) only for definitional purposes. Further, § 3142 only governs, as the Government concedes, release and detention pending trial. The § 3143(a)(2) situation is a post-trial, presentencing situation. Thus, beyond § 3142's definitional purpose, it is irrelevant in § 3143(a)(2) situations such as this one.

III. CONCLUSION

The instructions of Congress in this matter are unambiguous, unequivocal, and unmistakable. Contrary to the parties' suggestion, the Court does not find any "wiggle room" in the plain text and clear meaning of 18 U.S.C. §§ 3143(a)(2) and 3145(c). Consequently, the Court is compelled to deny release on bond because (1) Defendant's detention in this situation is mandatory, pursuant to 18 U.S.C. § 3143(a)(2), and (2) the Court lacks jurisdiction to determine whether any exceptional reasons, under 18 U.S.C. § 3145(c), merit the release of Defendant.

ACCORDINGLY, IT IS HEREBY ORDERED that release on bond is **DENIED**.

IT IS FURTHER ORDERED that, for the reasons stated above, Defendant shall be **DETAINED** pending sentencing pursuant to 18 U.S.C. § 3143(a)(2).

IT IS FURTHER ORDERED that, because matters in the case have already been sealed by order of the Court, this Opinion and Order shall also be **SEALED**.

IT IS FURTHER ORDERED that an appropriate redacted copy of this Opinion and Order shall be prepared and issued to legal publishers for the purposes of publication. This redacted copy shall replace the present case caption with the words "IN RE: SEALED CASE". This redacted copy also shall omit the case number.

SO ORDERED.

Dated: January 31, 2003

HONORABLE PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

STATE OF MICHIGAN

IN THE 18TH JUDICIAL DISTRICT COURT

THE PEOPLE OF THE
CITY OF WESTLAND,

Plaintiff Trial Court No. 03-900588

-vs-

TODD CACCAMO,

Defendant.

Mark McConnell P 46434
Attorney for Plaintiff
35330 Nanking Blvd, Ste. 702
Westland, Michigan 48185
(734) 421-5510

Demosthenes Lorandos, Ph.D.
P45005
Attorney for Defendant
214 North Fourth Avenue
Ann Arbor, Michigan 48104
(734) 327-5030

MOTION FOR *GINTHER* HEARING AND EXPANSION OF RECORD

NOW COMES the Defendant, by and through counsel, who pursuant to *People v Ginther,* 390 Mich 436 (1973) and MCR 6.500 *et seq,* moves this Court to hold a *Ginther* hearing and expand the record and says:

1. On March 9, 2003, Defendant appeared before this honorable court for purposes of pretrial, with his then attorney, Marc R. Lakin.

2. On March 9, 2003, Defendant, under the advice of his then attorney Marc R. Lakin, entered a *nolo contendere* plea to a charge of domestic violence.

3. This honorable Court accepted the plea under advisement.

4. On June 25, 2003, this honorable Court sentenced Defendant to fines, court costs and twelve months of non-reporting probation.

5. At sentencing, Defendant was represented by his attorney, Marc R. Lakin.

6. Defendant thereafter filed a Motion to Withdraw Plea on August 4, 2003, through his then attorney Christopher M. Drouillard.

7. The Motion was denied by this honorable Court on August 19, 2003.

8. On September 3, 2003, Defendant filed a Motion in *pro per* to request this honorable Court's reconsideration of motion to withdraw plea.

9. Defendant's Motion for Reconsideration was denied by this honorable Court's Order dated September 22, 2003.

10. On October 10, 2003, Defendant filed a Claim of Appeal against the denial of the Motion to Withdraw Plea.

11. Defendant requests an evidentiary hearing in this motion. The basis for that relief is:

    A. That he was denied the effective assistance of counsel at his sentencing, by virtue of his attorney's failure to counsel Defendant regarding the implications of pleading *nolo contendere.*

    B. That he was denied effective assistance of counsel in that attorney Marc Lakin did not follow the specific instructions of the Defendant and fraudulently led Defendant to enter a plea of *nolo contendere.*

    C. That he was denied effective assistance of counsel in that attorney Mark Lakin coerced

Defendant to enter a plea of *nolo contendere,* despite-Defendant's clear wish to the contrary.

D. That Defendant's attorney mislead and lied to him that the Defendant was not pleading under MCL 769.

E. That when Defendant asked his attorney to withdraw his plea, before the sentencing, Mr. Lakin out rightly refused to comply with the instructions of the Defendant.

F. That during the sentencing while this honorable Court was passing down the sentence, the Defendant protested to his attorney Lakin that this was not what he had agreed to and told Lakin to object and withdraw the plea. Lakin ordered Defendant to "shut-up" and coerced him to enter a plea and accept the sentence.

G. That after the sentencing, Defendant again requested his attorney to withdraw the plea and that Lakin consistently refused to follow Defendant's instructions.

H. That the attorney's performance was deficient, i.e., fell below an objective stand of reasonableness, and that the deficient performance prejudiced Defendant. *Strickland v Washington,* 466 US 668; 104 S Ct 2052 (1984).

In this case, it was a constant struggle between the Defendant and his counsel. The attorney repeatedly misguided the Defendant, misrepresented the law and at times even lied to him. The attorney fraudulently led the Defendant to believe that the Defendant was not pleading under MCL 769. The attorney also misrepresented the procedural law to the Defendant. Further, when the Defendant instructed his counsel to withdraw the plea, before the sentencing, counsel

refused and coerced the Defendant into accepting a "deal". The attorney's dismal failure to provide an effective defense denied Defendant a fundamental right to a defense.

Moreover, it cannot be said that this failure constituted any kind of rational defense strategy. Defendant had repeatedly stated that he was not guilty of the crime that he was charged with. Defendant's counsel agreed with the Defendant and also assured him that the Defendant's case was "a slam dunk" with 99.99% chance of acquittal [Defendant has earlier filed an affidavit to this effect along with his Motion to Withdraw dated August 4, 2003]. Thereafter, the attorney made the Defendant agree to a plea using fraud, coercion and misrepresentation. Under these circumstances, the level of representation fell below that which would satisfy the Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Strickland v Washington,* supra.

12. Defendant suffered actual prejudice from the errors set forth herein, in that but for his counsel's fraudulent and coercive behavior, the Defendant would have never agreed to the plea of *nolo contendere* and would have proceeded to the trial. Defendant has been throughout the proceedings proclaiming his innocence and wants his fair chance of trial by triers of fact.

13. Defendant also wishes to establish in the record, facts demonstrating the ineffective assistance of counsel by inclusion of his attached affidavit. Defendant also wishes to draw this honorable Court's attention, through the attached affidavit, to the reasons why he is so seriously prejudiced by the seemingly innocuous sentence entered by this honorable Court.

14. Defendant is entitled to an evidentiary hearing on the issue of ineffective assistance of counsel, as but for

the attorney's ineffectiveness, the Defendant would have been able to go forward with a trial with a highly likely chance of acquittal.

WHEREFORE, Defendant Todd Caccamo, maintains that the irregularities described were so offensive to the maintenance of sound judicial process that the sentence should not be allowed to stand, and asks this Honorable Court to:

1. Order an evidentiary hearing pursuant to MCR 6.500 *et seq* and *People v Ginther,* 390 Mich 436 (1973); *People v Smith,* 394 Mich 757 (1975) etc. on the issue of ineffective assistance of counsel; and

2. Order that the record be expanded as to include the attached affidavit of the Defendant

November 17, 2003 /s/ D. Lorandos
Demosthenes Lorandos, Ph.D. (P45005)
Counsel for Defendant

STATE OF MICHIGAN

IN THE 18TH JUDICIAL DISTRICT COURT

THE PEOPLE OF THE
CITY OF WESTLAND,

Plaintiff Trial Court No. 03-900588

-vs-

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR *GINTHER* HEARING AND EXPANSION OF RECORD

By counsel, Defendant respectfully makes following arguments:

1. Defendant was deprived of effective assistance of trial counsel concerning issues of making a plea of *nolo contendere*;

2. Defendant was mislead into making a plea of *nolo contendere* under advisement;

3. Defendant's counsel deliberately misrepresented the procedural law and fraudulently led the Defendant to enter a plea;

4. Having made Defendant unwillingly enter a plea of *nolo contendere,* Defendant's counsel, during the sentencing, coerced the Defendant and refused to accede to Defendant's frantic pleas for withdrawal of plea;

5. After sentencing, Defendant's counsel flatly refused to cooperate with Defendant in withdrawing the plea and behaved in an unprofessional manner as described in detail in the attached affidavit.

Defendant's counsel's ineffectiveness leading to the Constitutional violation of the Defendant's fundamental right to a defense can be better understood if broken down into logical parts. The first part would the acts of the

Defendant's counsel – acts constituting fraud, coercion, and misrepresentation. The second part would be the repercussions that those acts would have on Defendant's life and career.

I. DEFENDANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL

A criminal defendant is entitled to the effective assistance of counsel under both the Michigan and Federal Cons US Const, Am Vi, XT Const, 1963, Art 1, §20; and guaranteed of the due process, Mich Const, 1963, Art 1, §17. *People v Pickens,* 446 Mich 298; 521 NW2d 797 (1994); relying upon the well-established precedent developed under *Stirckland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed2d 674 (1984). These constitutional protections extend to all critical stages of the criminal proceedings.

The ethical rules for attorneys in every state incorporate requirements for basic competence.[1] When an erroneous outcome shows ineptitude in handling litigation, the focus of the inquiry as to liability for malpractice (and effective assistance), may be on the lack of requisite "skill"

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[1] For example, the *A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT* require: "RULE 1.1 Competence A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The *A.B.A. MODEL DISCIPLINARY RULES* – DR 6-101 Failing to Act Competently. Inform: "(A) A lawyer shall not: (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it. (2) Handle a legal matter without preparation adequate in the circumstances. . . ."

and "learning".[2] In modern litigation, courts look to the exercise of the skill and knowledge ordinarily utilized by attorneys in similar circumstances. But "ordinary" for these courts is not defined by what lawyers usually do but on an objective standard as to what lawyers *should do*.[3] For example, the instruction in *Hizey v Carpenter,* 119 Wash.2d 251; 830 P.2d 646 (1992) approved by the appellate court informs:

> "A lawyer has a duty to exercise the degree of skill, care and learning expected of a reasonably prudent lawyer in the State of Washington acting in the same or similar circumstances at the time such services are provided. The failure to exercise such skill, care and learning is negligence."

Against this backdrop, an examination of some of the basic ingredients of "skill" and "learning" may be helpful.

In 1975, the California Supreme Court in *Smith v Lewis*[4] held that an attorney must:

1. Possess knowledge of those elementary principles of law which are commonly known by well-informed attorneys;

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[2] See, e.g.: *Lucas v Hamm,* 56 Cal.2d 583; 15 Cal.Rptr. 821 (1961), *cert. Denied* 368 U.S. 987, 82 S.Ct. 603; 7 L.Ed.2d 525 (1962) and *Wright v Williams,* 47 Cal. App.3d 802; 121 Cal.Rptr. 194 (1975).

[3] See, e.g.: *Haas v Warren,* 112 N.C.App. 574; 436 S.E.2d 259 (1993) and *Little v Matthewson,* 114 N.C. App. 562; 442 S.E.2d 576 (1994).

[4] 13 Cal 3d 349, 118 Cal Rptr 621, 530 P 2d 589, 78 ALR3d 231 (1975); *See also*: Meiselman *Attorney Malpractice: Law & Procedure* Lawyers Cooperative Publishing 1980-1994 update.

2. Discover those added principles of law which, even if not commonly known, may readily be found by standard research techniques;

3. Undertake reasonable research efforts to discover relevant legal principles, even in unsettled areas of law; and

4. Make an informed decision as to a course of conduct based upon an intelligent assessment of the problem.

None of this seems to have been done on behalf of this Defendant.

The Michigan Supreme Court adopted the United States Supreme Court's standard for reviewing ineffective assistance of counsel claims articulated in *Strickland v. Washington,* 466 U.S. 668, 687; 104 S Ct 2052; 80 L.Ed.2d 674 (1984). *People v. Pickens,* 446 Mich. 298, 326; 521 NW2d 797 (1994). Under *Strickland,* a defendant must satisfy a two-pronged test to establish a claim of ineffective assistance of counsel. The Defendant must first demonstrate that counsel's performance was deficient by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* at 687. Then the Defendant must demonstrate that counsel's deficient performance prejudiced the defense by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687

Michigan courts have held that where a defendant contends that his guilty plea was induced by his attorney's false and fraudulent promises, the defendant is at least entitled to an evidentiary hearing:

> "Where a defendant files a motion and supporting affidavit claiming that his guilty plea was induced by his attorney's promise that he would receive a lenient sentence, he is entitled to an evidentiary hearing because his allegations raise a question of fact. . . . Similarly, we believe that where . . . a defendant claims that his guilty plea was induced by his attorney's faulty advice . . . and a proffer of proof is made on the record, the defendant is likewise entitled to an evidentiary hearing." *People v. Jackson, 203 Mich. App. 607, 612, 513 N.W.2d 206 (1994) relying on so People v. Sledge, 198 Mich. App. 218, 497 N.W.2d 582 (1993)*

The Courts have always frowned upon false and fraudulent promises by the attorney to their clients. The Michigan Court of Appeals in *People v. Schirle, 306 N.W.2d 520 (Mich. App. 1981)* observed:

> "It is a dangerous practice for defense attorneys to inform their clients that they will receive certain sentencing benefits by pleading guilty when, in fact, counsel is in no position to guarantee that the benefits will be received or that the plea may be withdrawn. . . . Unless a defense attorney has obtained a commitment which can be placed on the record at the time of the plea-taking, the practice of assuring a client that certain benefits will be received by virtue of the plea is fraught with danger. Since we are unable to ascertain with any certainty what statements were made to defendant by his attorney, and how these statements were put, we must remand for further proceedings." *Id.* at 522.

In the present case, Defendant's then-attorney, Marc Lakin, made numerous false and fraudulent "promises" to induce Defendant to plead *nolo contendere.* Defendant detrimentally relied upon these assertions. These erroneous assertions of Lakin's are documented in the attached

affidavit of Defendant [These assertions were also documented in an affidavit filed by the Defendant along with his Motion to Withdraw the Plea dated August 4, 2003]. The evidence, which when read *in toto* seems incredulous because it leaves one with the inescapable conclusion that Mr. Lakin "sacrificed" the Defendant for the convenience of pleading his future clients, reveals that:

- ξ Lakin assured the Defendant that his case was "a slam dunk" with 99.99% chance of acquittal;
- ξ Lakin told the Defendant that the deal was "No contest with 6 months non-reporting probation, under-advisement with no mention of DV classes, fines, costs, etc." (instead, what Defendant received was 12 months of probation with fines, costs, classes);
- ξ Lakin specifically reassured Defendant numerous times that the Defendant was not pleading under MCL 769 (although Lakin pled the Defendant under MCL 769);
- ξ Lakin repeatedly informed the Defendant that "No Contest" is not at all considered a guilty plea;
- ξ Defendant *consistently* instructed Lakin, *prior, during and after sentencing,* to withdraw the plea, to which Lakin refused, stating "Look. I am not withdrawing that plea. You're going to make us both look like fools." Further, Lakin ordered Defendant to "shut-up" as Lakin wasn't about to lose credibility with this honorable court. Lakin's behavior was not only atrocious but also clearly illegal. "The decision to plead guilty is the defendant's, to be made after consultation with counsel and after counsel has explained the matter to the extent necessary to permit the client to make

an informed decision." *People v. Corteway*, 212 Mich.App 442, 446; 538 NW2d 60 (1995);

- ξ Lakin was far more interested in not "rocking the boat" with this case, thereby preserving his ability to plead out future clients.

Also, the plea hearing transcript makes abundantly clear that Defendant's attorney misunderstood, and thereby misled him, about the nature and character of his *nolo contendere* plea taken under advisement.

Given these facts, all of which can be demonstrated at an evidentiary hearing in this matter, there can be no conclusion but that the Defendant's then-defense attorney was totally ineffective and further utterly deliberately failed to act according to the Defendant's specific instructions. The plea that the Defendant entered was based on his attorney's false promises and coercive manipulation. Such a plea cannot be considered either knowing or voluntary. Defendant was made to agree to a "bargain" which he never: understood, agreed or accepted – through fraud and coercion.

II. REPURCUSSIONS OF THE INEFFECTIVE ASSISTANCE OF THE ATTORNEY

Defendant wishes to put on record the repercussions of the ineffective assistance of the attorney. The seemingly innocuous "bargain" or "deal" that the attorney was pleased to procure for the Defendant has put the entire career and future aspirations of the Defendant into jeopardy. Even though the attorney was fully aware of the Defendant's background and his current profession, counsel, through fraud and coercion, made the Defendant

enter into a plea which might wreck all future aspirations of the Defendant. Consider following:

- ξ Lakin pled the Defendant under MCL 769. Even though Lakin had previously assured the Defendant that he would NOT be pleading under MCL 769, Lakin acted directly contrary to his advice.

- ξ Lakin knew that a MCL 769 conviction could be considered by courts in the future for sentencing and/or scoring under the Sentencing Guidelines. Lakin, as any other attorney, should be aware that even though "dismissed" at the end of probation, the suppressed record may prevent the Defendant from obtaining a high security clearance and will likely prevent the Defendant from obtaining a CCW or even from purchasing a gun.

- ξ Lakin was aware that the Defendant was running a martial arts school, teaching people the art of self-defense. Lakin also knew that the Defendant had a permit to carry a concealed weapon, possessed weapons for the instruction of firearm defense and taught NRA, certification classes. Lakin was aware that by making the Defendant plead *nolo contendere* to a charge of domestic violence, Lakin was putting the Defendant's entire career in jeopardy.

- ξ Lakin was aware that the Defendant is a former United States Marine Corps. Lakin was also aware that the Defendant had earned a MBA degree and has future aspirations to go to the law school and hold a political appointment. The Defendant has worked hard to reach his goals and now these future aspirations of the Defendant are put in jeopardy due to stupid and fraudulent acts of his counsel.

- Lakin was aware that the Defendant enjoyed hunting and had a hunting license. Now, due to these acts of Lakin, the Defendant may even have trouble getting a hunting license.

The record in this matter is incomplete. The Defendant wishes to incorporate the instances of brazen conduct of his counsel, Marc Lakin, into the record so as to reflect the ineffectiveness of counsel. The Michigan Supreme Court has observed:

> "If the record . . . does not factually support claims . . . [defendant] should move in the trial court for a new trial or, where the conviction is on a plea of guilty, to set aside the plea, and seek to make a separate record factually supporting the claims." *People v Ginther,*, 390 Mich 436, 443 (1973) citing *People v. Taylor,* 387 Mich. 209, 218, 195 N.W.2d 856 (1972)

The Defendant is aware that the Defendant bears a heavy burden of proving the ineffectiveness of his counsel. Coupled with incomplete record, this burden would be impossible to overcome. To establish ineffective assistance of counsel, the Defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *People v. Pickens,* 446 Mich. 298, 302-303, 521 N.W.2d 797 (1994); *People v. Tommolino,* 187 Mich.App. 14, 466 N.W.2d 315 (1991).

The Defendant wishes to bring the ineffectiveness of his counsel on the record. The present record, as it is, does not reflect the "true picture" and is lacking in details. The Defendant wishes to bring on the record his attached

affidavit and also demonstrate during the evidentiary hearing the gross ineffectiveness of his counsel.

Respectfully submitted,

November 17, 2003 /s/ D. Lorandos
Demosthenes Lorandos, Ph.D., J.D.
(P45005)
Counsel for Defendant

STATE OF MICHIGAN

IN THE 18TH JUDICIAL DISTRICT COURT

THE PEOPLE OF THE
CITY OF WESTLAND,

Plaintiff-Appellee, Trial Court No. 03-900588

-vs- HON. C. CHARLES BOKOS

TODD CACCAMO,

Defendant-Appellant.

PROOF OF SERVICE

The undersigned attorney warrants and says that, on this day, he personally cause to be served, a copy of the Motion for *Ginther* Hearing and Expansion of Record along with accompanying Memorandum of Law and Affidavit on the Clerk of the 18th Judicial District Court. Further, the same were also served through First Class mail on Mark McConnell, the attorney for Plaintiff and the Clerk of the 3rd Circuit Court for the Wayne County.

November 17, 2003 /s/ D. Lorandos

Demosthenes Lorandos, Ph.D., J.D.
Attorney for Defendant-
Appellant P 45005
214 North Fourth Avenue
Ann Arbor, Michigan 48104
734-327-5030 office
734-327-5032 fax

STATE OF MICHIGAN

IN THE 18TH JUDICIAL DISTRICT COURT

THE PEOPLE OF THE
CITY OF WESTLAND,

Plaintiff Trial Court No. 03-900588

-vs-

TODD CACCAMO,

Defendant.

Mark McConnell P 46434
Attorney for Plaintiff
35330 Nanking Blvd, Ste. 702
Westland, Michigan 48185
(734) 421-5510

Demosthenes Lorandos, Ph.D.
P45005
Attorney for Defendant
214 North Fourth Avenue
Ann Arbor, Michigan 48104
(734) 327-5030

AFFIDAVIT OF TODD CACCAMO

Affiant states as follows:

1. I am Todd Stephen Caccamo.
2. I have personal knowledge of the following facts.

3. I am willing to testify that the following facts are true.

4. When I first retained Mr. Marc Lakin, he assured me that our case was "a slam dunk" with 99.99% chance of acquittal.

5. Mr. Lakin and I spoke about this offered "deal". I was told that the deal was "No contest with 6 months non-reporting probation, under-advisement with no mention of DV classes, fines, costs, etc. . . . " He said to me "Take the deal. It's a phenomenal deal. These are nice people. I don't want to piss them off. It might ruin my chances of getting the next guy a deal. Think about the next guy who is really in trouble and really needs a deal. Don't ruin it for him."

6. Mr. Lakin also advised me that this plea can be withdrawn at anytime, even after sentencing, even up to the last day of probation, if I were to so desire.

7. Mr. Lakin firmly and specifically reassured me numerous times that we were not pleading under MCL 769.

8. Mr. Lakin repeatedly informed me that "No Contest" is not at all considered a guilty plea.

9. When I had called the Probation Department on the day of my PSI appointment, the woman on the phone informed me that they "had me down as Guilty."

10. I thereafter called Mr. Lakin and ordered him to withdraw this plea. Mr. Lakin refused. He stated, "You're not guilty. That's what I hate about these [Westland] clerks. They don't know what they're talking about. And besides, you can't be sentenced since you're not (pleading)

guilty." I insisted again. He rebutted, "Look, I am not withdrawing that plea. You're going to make us both look like fools. You look good right now. Now we are going in there as men of our word and accepting the deal! End of story. Now you get right back on that phone and call the probation department back and tell them that you're coming in as scheduled!"

11. Next, at the sentencing white Judge C. Charles Bokos was passing down sentence, I spoke to Mr. Lakin and told him that this was not the deal I was informed of! I ordered Mr. Lakin to withdraw the plea before the sentencing was completed. Mr. Lakin ordered me to "shut-up as he wasn't about to lose credibility with this court." I whispered again to Mr. Lakin to withdraw the plea. It was at this juncture that Judge Bokos asked me, "Mr. Caccomo, are you listening?"

12. Following the sentencing hearing, I told Lakin that this was not the deal as promised. Lakin pats me on the knee and says, "Don't worry. You made out great, kid. Call me tomorrow."

13. I then went to see the probation department (without Lakin). I told the woman that was going over my file with me that this not the deal I was told about at all by my attorney or by the PSI I had with Melanie Sheridan. Melanie specifically stated to me that she was recommending " . . . six months non-reporting, no contact, no harm. . . . " This woman then stated, "It's under advisement. If you're not happy with this, we can march you right back into Judge Bokos' court and he can just put this offense on your record then if you prefer."

14. On Tuesday, July 1, 2003, I went to Mr. Lakin's office and again requested him to withdraw this plea. He refused.

15. I have consistently asked my then attorney Marc Lakin to withdraw my plea of *nolo contendere* before, during and after sentencing. Lakin refused to do so solely for his personal gain and to maintain his "credibility" with the Court.

I affirm under penalty of perjury that the foregoing facts are true to the best of my knowledge, information and belief.

/s/ Todd Stephen Caccamo
Todd Stephen Caccamo

Subscribed and sworn to before
this 15 day of November 2003.

/s/ Rupal R. Parikh
Notary Public

RUPAL R. PARIKH
Notary Public, Wayne County, MN
My Commission Expires 2/17/07

Supreme Court U.S.
FILED
MAY 31 2006
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No. 05-1388

In The
Supreme Court of the United States

TODD STEPHEN CACCAMO,

Petitioner,

v.

PEOPLE OF THE CITY OF WESTLAND,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Michigan

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANGELO A. PLAKAS AND ASSOCIATES, P.C.
ANGELO A. PLAKAS (P 18934)
MARK A. MCCONNELL (P 46434)
Counsel of Record
Attorneys for Respondent, City of Westland
35330 Nankin Boulevard, Suite 702
Westland, MI 48185
(734) 421-5510

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Has the Petitioner shown any compelling reason for review by this Court, where his claims have been fully considered, and rejected by the Michigan trial courts, the Michigan Court of Appeals, and the Michigan Supreme Court, and the issue raised is now moot?

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COUNTER-STATEMENT OF FACTS

On May 9, 2003, Petitioner Todd Caccamo entered a nolo contendere plea in the 18th District Court to violating the local misdemeanor domestic violence ordinance for the City of Westland, Michigan, Westland City Code, Section 68-67(a). (Petitioner's Appendix, pp 45-52.) This plea was taken under advisement pursuant to Michigan Compiled Laws (MCL) 769.4a. That statute allows a person who has no previous convictions for assaultive crimes to keep a conviction for domestic violence off their permanent criminal conviction history record. MCL 769.4a(5) provides:

> (5) Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against the person. Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.

Petitioner was sentenced on June 25, 2003, consistent with the plea agreement that the charge would be taken under advisement (Petitioner's Appendix, pp 32-44.) Petitioner was sentenced to one year of non reporting probation, required to attend a domestic violence weekend program and follow any recommendations made by that program, have absolutely no contact with the Victim and her home, and pay $300 in fines and costs, $10 judgment fee and $240 in probation costs. (Petitioner's Appendix, p 44.)

After sentencing, Petitioner filed a Motion to Set Aside his May 9, 2003, plea. At the hearing on that

Motion, Petitioner indicated that he wanted the plea set aside because the Victim was harassing him. At the hearing, the Petitioner stated:

> MR. CACCAMO: The biggest concern, your Honor is if this was a normal – assuming that whatever happened happened in any way, shape or form, if this was a normal complaint I would take this thing and run with it, but as Mr. Drouillard pointed out, this woman is not letting this thing go.
>
> In fact, you know even Mr. Lakin said to me, you know, you have nothing to worry about from Judge Bokos, you have to worry about this woman shooting you and your wife one day. And neither here or there, I would like the opportunity to clear the name because she continues to harass, she continues to contact customers and my name used to be synonymous with – with community service. Now it's synonymous with horrible things. It's horrible. [Petitioner's Appendix, 28-29].

Petitioner also complained about being required to attend a domestic violence class as a part of his sentence. (Petitioner's Appendix, pp 29-31.)

Since Petitioner has now successfully completed all of the requirements set forth by the District Court under the terms of his plea, the charge has been dismissed. As stated on p 86a of the Appendix attached to Petitioner's Application:

> if the accused fulfills the terms and conditions of probation, the court must discharge the individual from probation and dismiss the proceedings against him or her. MCL 769.4a(5). Discharge

> and dismissal is without adjudication of guilt and is not a conviction for purposes of disqualification or disabilities imposed by law for conviction of a crime. MCL 769.4a(5).

Accordingly, the relief requested in Petitioner's Application has already been granted, as the case has been dismissed, and this dismissal has therefore not affected any legal rights. Therefore, the current Application is moot.

The 18th Judicial District Court denied Petitioner's Motion to Set Aside (Petitioner's Appendix, p 31.) Petitioner, in pro per, then filed a Motion for Reconsideration, which the 18th Judicial District Court also denied in a four page written Opinion. (Petitioner's Appendix, pp 8-11.)

Petitioner, with the assistance of his fifth attorney, then appealed to the Wayne County Circuit Court, Criminal Division. In this appeal, Petitioner cited the Michigan Court Rule applicable to felony plea takings, not misdemeanors, as the rule applicable to support his position that the District Court failed to properly take or accept his plea. After hearing oral argument, the Honorable Vera Massey Jones entered an Order setting aside Petitioner's plea, and remanded the case back to the 18th District Court (Petitioner's Appendix, pp 6-7.)

Respondent, The People of the City of Westland, then filed a Motion for Reconsideration before the Honorable Vera Massey Jones, which was subsequently denied on April 8, 2004. Respondent then filed an Application for Leave to appeal the ruling of the Wayne County Circuit Court, Criminal Division with the Michigan Court of Appeals. On August 23, 2004, the Court of Appeals granted Respondent's Application for Leave to Appeal.

On February 15, 2005, after oral argument, the Court of Appeals vacated the Circuit Court's ruling and reinstated the District Court's ruling. (Petitioner's Appendix, pp 2-5.) Petitioner then filed a Motion for Reconsideration, which the Court denied on April 11, 2005. (Petitioner's Appendix, p 54.)

Petitioner then requested leave with the Michigan Supreme Court, which was denied on October 31, 2005 (Petitioner's Appendix, p 1.) Petitioner's Petition for a Writ of Certiorari now follows.

ARGUMENT

STANDARD OF REVIEW

The Court in *People v Eloby (after remand)*, 215 Mich App 472, 474-475, stated:

> After a plea has been accepted by the Trial Court, there is no absolute right to withdraw the plea. When a Motion to withdraw a plea is made after sentencing, the decision whether to grant it rests within the discretion of the Trial Court. That decision will not be overturned on Appeal unless there is a clear abuse of discretion resulting in miscarriage of justice. (Citations omitted)

Since Petitioner's Motion to Withdraw his plea was made after sentencing, the Circuit Court reviewed the District Court's decision to deny the request to withdraw Petitioner's plea for an abuse of discretion. An abuse of discretion can only be found if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505, lv den

445 Mich 914 (1994). Petitioner did not demonstrate to the Circuit Court that the District Court abused its discretion, and the Court of Appeals correctly vacated the Circuit Court's ruling. The Michigan Supreme Court therefore properly denied Petitioner's Application for Leave to Appeal.

I. PETITIONER'S ISSUE IS MOOT

Petitioner's case has been dismissed and closed by the 18th Judicial District Court as he successfully completed the terms of his probation. There is therefore, no pending matter for this Court to review.

II. PETITIONER'S NOLO CONTENDERE PLEA WAS UNDERSTANDINGLY AND VOLUNTARILY MADE

Under Michigan law, there is no absolute right to withdraw a guilty or a nolo contendere plea after the plea has been accepted by the Court. *People v Kennebrew*, 220 Mich App 601, 605 (1996). Dissatisfaction with a sentence is not grounds for withdrawing a guilty plea. *People v Wilhite*, 240 Mich App 587, 597 (2000). Furthermore, it is the defendant who has the burden of establishing "a fair and just reason for the withdrawal of the plea." *Kennebrew, supra*.

No fair and just reason for withdrawing the plea in the present case was presented to the District Court. Petitioner changing his mind because the victim is allegedly harassing him, is not a fair and just reason for withdrawing a plea. If the victim is harassing him, he does have remedies available to him under the law to end such alleged harassment. Moreover, dissatisfaction with being

required to attend a domestic violence class is not a permitted basis for setting aside a plea. *Wilhite, supra.* The District Court did not clearly abuse its discretion in denying Petitioner's request to set aside his plea, and the Court of Appeals correctly vacated the Circuit Court's ruling to the contrary.

The Circuit Court believed that the District Court did not comply with MCR 6.610(E), because it did not inquire with the Petitioner as to whether the plea was understanding and voluntary. A review of the transcript will show that the Circuit Court mistakenly believed that some additional questions or findings on the record was necessary for the District Court to find a plea understanding and voluntary. (Petitioner's Appendix, pp 12-24.)

At the oral argument, the Court stated the following:

> THE COURT: There was a problem in the Judge's recitation of the rights the client was giving up in an inquiry. I don't believe he made any inquiry about whether or not he had been threatened or promised anything. (Petitioner's Appendix, pp 13-14.)
>
> * * *
>
> But I could not find in this transcript anyplace where he was inquired as to whether anybody had threatened him or promised him anything. (Petitioner's Appendix, p 15.)

In his Brief to the Circuit Court, Petitioner focused his attention on MCR 6.302, the Court Rule applicable to felony plea takings. Pursuant to MCR 6.302, a Court in a felony case, must make specific inquiries regarding the understanding and voluntary nature of the plea. Such specific inquiries are absent from MCR 6.610(E)(1), the

court rule applicable to misdemeanors. It was this focus, that caused the Circuit Court to erroneously rely on the incorrect Court Rule. The Michigan Court of Appeals and the Michigan Supreme Court both recognized this error, and correctly applied MCR 6.610(E)(1).

The 18th District Court did comply with the applicable Court Rule, MCR 6.610(E), which, in pertinent part, provides:

> **(E) Pleas of Guilty and No Contest.** Before accepting a plea of guilty or no contest the court shall in all cases comply with this rule.
>
> (1) The court shall determine that the plea is **understanding, voluntary**, and accurate. In determining the accuracy of the plea,
>
> * * *
>
> (b) if the defendant pleads nolo contendere, the court shall not question him or her about his or her participation in the crime, but shall make the determination based on other available information.

The Court in *People v Ingram*, 166 Mich App 433, 437-438 (1988), held that a guilty plea is valid if the "defendant was sufficiently informed of his constitutional rights and the incidents of trial to warrant a conclusion that he understood what a trial is and that by tendering his plea he was knowingly and intelligently giving up his right to a trial and its consequent rights and protections."

In the *Guilty Plea Cases*, 395 Mich 96, 126 (1975), cert den 429 US 1108, this Court held:

> The rule does not require a judge to make this determination in any particular manner. **He need not**, contrary to the contention in *Burkett*, **ask the defendant whether his plea of guilty is "freely, understandingly and voluntarily made."**
>
> **The judge's determination that the plea is freely, understandingly and voluntarily made may be concluded from the judge's acceptance of the plea even though he makes no separate finding of fact on this issue.** [Bold and underline added.]

The 18th District Court followed the requirements of MCR 6.610(E)(1) regarding understanding and voluntary. The following quotes from the plea taking in the 18th District Court establish that Petitioner's plea was understanding and voluntary:

> MR. LAKIN: Is there a plea from in the file that we have to sign?
>
> THE COURT: There is.
>
> MR. LAKIN: If I could just go over it with him.
>
> THE COURT: Okay. Well, you want to take some time with him?
>
> MR. LAKIN: **No. We already know what it is.** (Petitioner's Appendix, p 46, emphasis added.)
>
> * * *
>
> THE COURT: . . . .
>
> Mr. Caccamo is going to plead no contest to a charge of domestic violence and it will be taken under advisement as long as he completes his sentence satisfactorily. Any objection to that?

MS. KURTH: No.

THE COURT: Okay. Now, that is the plea agreement, Mr. Lakin, is that correct?

MR. LAKIN: That is.

THE COURT: Mr. Caccamo, my understanding is you're going to plead no contest –

MR. LAKIN: Do you want us to go to the podium?

THE COURT: You can sit right there, if you want.

MR. LAKIN: Okay, thank you.

THE COURT: Plea no contest to a charge of domestic violence and as long as you do everything I tell you to do and complete my sentence satisfactorily, you'll have an opportunity to keep this offense off your record, **understood?**

THE DEFENDANT: **Yes, sir.** (Petitioner's Appendix, pp 46-47, emphasis added.)

* * *

THE COURT: . . .

All right. No contest means you neither admit nor deny guilt, but I determine your guilt by looking at the police report. If I'm satisfied there's a basis for these charges, I can accept your no content plea and treat it just as if you plead guilty. **Any questions about that?**

THE DEFENDANT: **No, sir.**

THE COURT: The offense carries a penalty of up to ninety days in jail and a fine of up to five hundred dollars – ninety-three days in jail and a

fine of up to five hundred dollars. Those are the maximum penalties the Court can impose.

By pleading no contest, you give up the right to have a trial. You **give up the right to have that trial before a judge or a jury**. You give up the right to be presumed innocent throughout the trial, until your guilt's established beyond a reasonable doubt by the Prosecutor. You give up the **right to remain silent and not testify during the trial**, without it used against you. You give up the right to have witnesses brought in to assist your defense and you **give up the right to cross-examine and confront anybody who might be a witness against you.** Those are the ones that you give up by pleading no contest. **And I'm sure you and Mr. Lakin went over those rights, is that correct?**

THE DEFENDANT: **Yes.**

THE COURT: **Do you have any questions at all about the rights you're giving up?**

THE DEFENDANT: **No, sir.** (Petitioner's Appendix, pp 48-50, emphasis added.)

It is clear, based on the cited case law, that the 18th District Court followed the applicable Court Rule. The Court asked Petitioner numerous times if he understood what the Court was saying, and if he had any questions. Furthermore, by accepting the plea, the Court obviously found that Petitioner understandingly and knowingly entered into it. *Guilty Plea Cases, supra.* There is no requirement, contrary to the Circuit Court's conclusion, that the District Court ask the defendant whether his plea of guilty is freely, understandingly and voluntarily made. *Guilty Plea Cases, supra.* There were no errors committed

by the District Court, and accordingly no abuse of discretion, that would provide the Wayne County Circuit Court with a basis for setting aside Petitioner's plea. The Court of Appeals correctly vacated the Circuit Court's ruling, and the Michigan Supreme Court correctly denied Petitioner's Application. This Court should follow suit.

III. PETITIONER HAS NOT ESTABLISHED THAT ANY ALLEGED ERROR WAS MORE THAN HARMLESS

Assuming arguendo that there was any error committed by the 18th District Court in taking or accepting Petitioner's plea, any such error was harmless which does not require reversal of the Court of Appeals reinstatement of the 18th District Court's ruling.

A relatively recent opinion from the Michigan Supreme Court has made it clear that there is no basis for setting aside a plea if "there was substantial, not strict, compliance with MCR 6.302." This Court in *People v Saffold*, 465 Mich 268, 276, reh den 465 Mich 1204 (2001), addressed the plea taking procedure. The Court stated that "[i]f from the record it appears that the defendant has been informed of his right to a trial and that this right is being waived by his plea of guilty, reversal is not required by the omission of any of the rights enumerated in the court rule, even the presumption of innocence."

Even if the record did not show that Petitioner's plea was understanding and voluntary, such a finding was not necessary, as the plea taken by the District Court substantially complied with MCR 6.302, and the court rule applicable to misdemeanors, MCR 6.610.

Furthermore, when an error does not contribute to the judgment, it is harmless. *People v Thinel (on remand)*, 164 Mich App 717, 721 (1987). A reviewing court may not reverse a judgment when the error is harmless. MCL 769.26. The defendant bears the burden of establishing reversible error. *People v Rowell*, 14 Mich App 190, 196, lv den 382 Mich 763 (1969).

Two inquiries are important to determining whether there was a harmless error. First, is the error so offensive to the maintenance of a sound judicial process that it can never be regarded as harmless? Second, if not so basic an error, can the reviewing court declare a belief that the error was harmless beyond a reasonable doubt? *People v Robinson*, 386 Mich 551, 563 (1972).

Petitioner has not met his burden of establishing that any alleged error committed by the District Court resulted in reversible error. Accordingly, any error, assuming there was any error, was harmless.

CONCLUSION AND RELIEF

For all of the reasons stated above and in the Court's record, Respondent respectfully requests that this Court deny the Petition and bring an end to this case.

Respectfully submitted,

ANGELO A. PLAKAS AND ASSOCIATES, P.C.
ANGELO A. PLAKAS (P 18934)
MARK A. MCCONNELL (P 46434)
Counsel of Record
Attorneys for Respondent, City of Westland
35330 Nankin Boulevard, Suite 702
Westland, MI 48185
(734) 421-5510

Date: May 31, 2006